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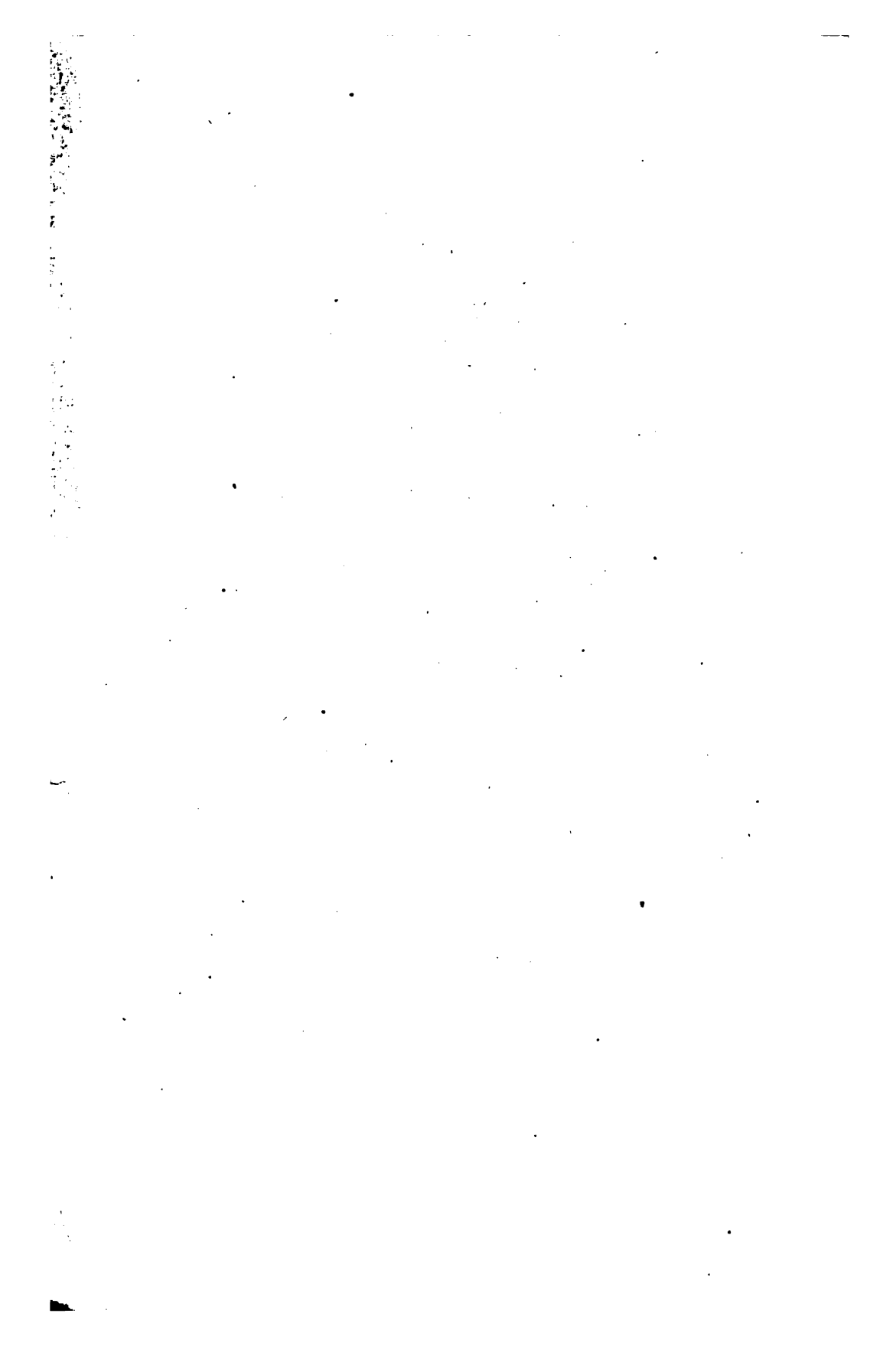
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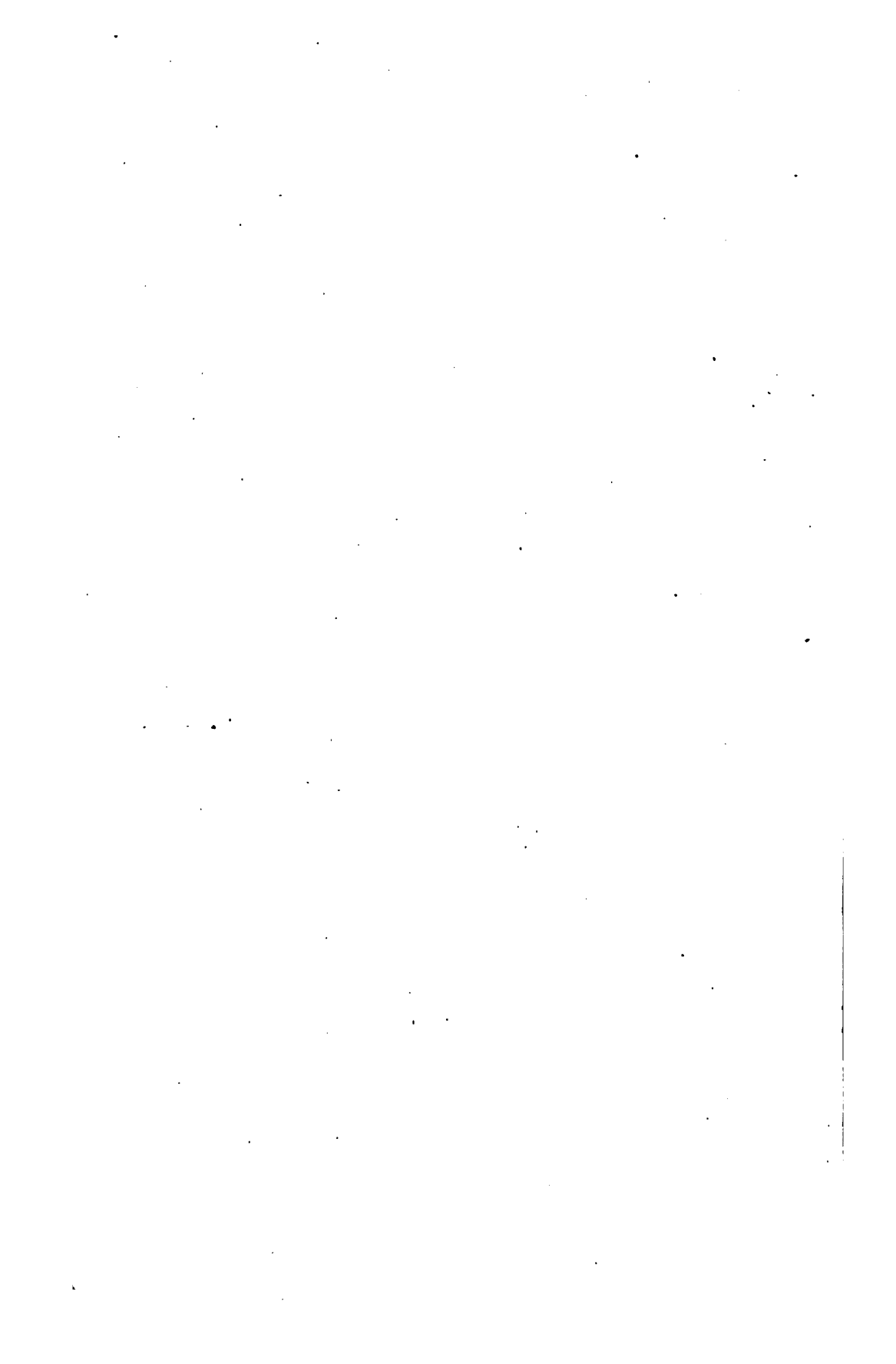
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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland,
AND IN THE
HIGH COURT OF CHANCERY OF MARYLAND,
FROM
FIRST HARRIS & McHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.
ANNOTATED BY
WILLIAM T. BRANTLY,
OF THE BALTIMORE BAR.
VOLUME XXV.
CONTAINING THE TWELFTH VOLUME OF GILL & JOHNSON'S REPORTS.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Hon. JOHN BUCHANAN, Chief Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.

COURT OF CHANCERY.

Hon. THEODORICK BLÁND, Chancellor.

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Saint Mary's, Charles and Prince George's Counties.

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Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, “

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Cecil, Kent, Queen Anne's and Talbot Counties.

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, “ “

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Hon. THOMAS H. WILKINSON, Associate Judge.
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Hon. ABRAHAM SHERIVER, Associate Judge.

Hon. THOMAS BUCHANAN, “ “

SIXTH JUDICIAL DISTRICT.

Baltimore and Harford Counties.

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Hon. RICHARD B. MAGRUDER, Associate Judge.

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BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, “ “

ATTORNEY-GENERAL.

JOSIAH BAYLEY, Esquire.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

DECEMBER TERM, 1841.

* *SAMUEL LUCAS et al. vs. MICHAEL McBLAIR et al.*—Decem- **1**
ber, 1841.

By the Act of 1838, chap. 323, commissioners were appointed by name to build a Town Hall in Baltimore, and with power, by a scheme or schemes of lotteries and sales thereof, or tickets therein, to raise the sum of, &c. These schemes were to be approved of by the Commissioners of Lotteries. By the Act of 1839, confirmed in 1840, it became a part of the Constitution of Maryland, that "no new grant to authorize the drawing of any lottery, or the traffic or dealing in lottery tickets, or schemes or devices in the nature of lotteries, &c. shall be made." The Commissioners of Lotteries were public officers of annual appointment. By bill filed in 1841, the Town Hall Commissioners complained, that while they were endeavoring to sell the tickets in their schemes, the Commissioners of Lotteries, since the Acts of 1839-40, "approved, and allowed to be availed of, (and allowed tickets therein to be sold under licenses,) schemes of lotteries for the State of Maryland, and schemes of lotteries granted and authorized by other States than Maryland; stamped tickets in such schemes, and issued them to contractors for sale, and under pretext of licenses emanating from such Commissioners of Lotteries, that the same were largely sold, thereby violating the Acts of 1839-40, also seriously interfering with the sales of the complainants, in their Town Hall schemes authorized by the Act of 1838. To restrain this evil their bill prayed for an injunction against the Commissioners of Lotteries, and the persons licensed by them, in relation to the approval of tickets in the lotteries for this State and other States, and * sales of tickets therein and granting licenses therefor. Upon this it was held— **2**

That considering the difficulty of obtaining adequate redress at law, and the probability that a multitude of suits would necessarily be instituted

to protect the complainant's franchise, the process of injunction was a proper remedy. (a)

That as trustees, invested by law with an important public duty, they were competent, as parties complainants, to proceed in equity in their own names, to protect the franchise committed to them from violation.

The State was not necessary party to the bill in order to obtain an injunction.

It was the object of the Act of 1839, chap. 39, to prohibit in future, all lottery grants by the Legislature, and all grants of licenses to deal in lotteries by the lottery commissioners, so far as it could be done without affecting antecedent or prior vested rights, secured by a constitutional sanction.

The difficulty of obtaining adequate redress in a Court of law is one of the well established grounds for resorting to a Court of Chancery, and especially where in the pursuit of justice it may be necessary to resort to a multiplicity of actions at law.

A statute privilege, in possession, of an exclusive character, not admitting of an injurious competition, may in its use and enjoyment be protected by injunction, equally essential in such cases to prevent ruinous litigation, as fraud and evasion of the right. A franchise to propose a scheme of a lottery and sell tickets for a particular object, is so far of an exclusive nature, as to be within the principle above stated.

The Act of 1828, chap. 129, sec. 21, recognizes the propriety of a resort to the writ of injunction in such cases. To prevent irreparable injury or multiplicity of suits, are grounds for obtaining an injunction. This preventive remedy is now granted more liberally than formerly.

Commissioners appointed by law—invested with a public trust—with means for its execution—with full power to act—must be entitled to use all the appropriate means necessary to the end in contemplation, and are regarded as having such an interest in the subject confided to them, as will enable them to proceed before the tribunals of the country, for the due protection of the rights entrusted to them.

It is not necessary in all cases, that the *cestui que trusts* or parties beneficially interested, should be parties to a bill in equity.

Executors and administrators who may sue, or be sued, in many cases sufficiently represent creditors, legatees or distributees, for whom they are trustees. (b)

The want of a party as a defendant, is generally no ground upon which to claim a dissolution of an injunction; a necessary party may be supplied before final hearing.

It is the constant aim of Courts of equity to do complete justice, by deciding upon and settling the rights of all parties interested in the subject-matter * of the suit, but this may be obtained by having the necessary parties before the Court at any time before the final decree is passed.

If all parties interested are not made parties to the suit, the Court many times, upon hearing, will not for want of them proceed to a decree.

The Act of 1839, chap. 31, was not confined to grants of lottery privileges by the Legislature, but was intended to cover the whole system of dealing in lotteries, and to prohibit the granting of Licenses by the Lottery Commissioners, and the sale of schemes by them, except as to existing

(a) Relied on in *White vs. Flannigan*, 1 Md. 547; *Hyde vs. Ellery*, 18 Md. 501. Distinguished in *Carlisle vs. Stevenson*, 8 Md. Ch. 505.

(b) Affirmed in *Gordon vs. Small*, 53 Md. 556.

private lottery grants; and the power the Legislature before possessed of regulating such private grants, and the means by which they might be more effectually and speedily accomplished.

Where the object of the Legislature in passing a statute, was the suppression of a great moral evil, the construction of it should be benign and liberal, and not so restricted as to leave much of the mischief designed to be suppressed, the chance of still being successfully pursued. (c)

The title and preamble of an Act are, strictly speaking, no parts of it, though they may be resorted to in explanation of the enacting clause, if it be doubtful; or to restrain its generality, when it would be inconvenient if not restrained.

APPEAL from Chancery. On the 4th December, 1841, Samuel Lucas, William Gwynn, Charles G. Ridgely, Oliver Holmes, George G. Belt and Chas. F. Mayer, exhibited their bill of complaint against Michael McBlair, George Cooke, Samuel Scribner, Henry M. Bash, William Pyfer and J. G. Gregory, and other persons composing the partnership of J. G. Gregory and Company, alleging that, by an Act of the General Assembly of Maryland, passed at December Session of 1838, chapter 323, entitled, "An Act in aid of the construction of a State Armory and Town Hall in the City of Baltimore, and the rebuilding and improvement of the Hanover Market House in said city. Your orators (excepting Holmes,) were appointed commissioners for the purpose of raising, by sales or drawing of schemes of lotteries, the requisite sum of money for the construction of the State Armory and Town Hall, which for the public convenience and defence, it was the purpose of said Act to have erected. And your orators further show, that at their December Session, 1839, chap. 52, an Act supplemental to that just mentioned, was passed by said General Assembly, extending the term of operation of the original Act, and of the privileges and rights *conferred by said Act. And your orators pray reference to said original and supplemental 4 Acts, as they appear in the printed compilations of the Acts of the aforesaid sessions, and that they be deemed and taken as part of this their bill. Your orators now further state, that the Mayor and City Council of Baltimore, whose property and interest are to be availed of, and to be affected by the said Acts, and by the structure by the same required, did, in consideration that said structures should be made, become a party to said Acts of Assembly, and grant their assent, and the privilege and control to the said commissioners in respect of the use of the ground and property of said corporation, which are contemplated in the fourth section of the said original Act. And your orators state, that thereupon, and to accomplish the project so devised and ordained by the State of Maryland, and through the said assent and concession of said corporation, so stipulated for by

(c) Cited per MASON, J. in *Charles vs. Claggett*, 3 Md. 88. See *Canal Co. vs. R. R. Co.* 4 G. & J. 6, note (m).

the Mayor and City Council of Baltimore, the commissioners aforesaid proceeded to make contracts with persons for purchase of schemes of lotteries so authorized, which contracts were performed; and finally to cause schemes of lotteries to be drawn under their own direction, they by their agents selling the tickets therein. And your orators aver, that as commissioners under the Acts aforesaid, they are now engaged in carrying out the objects of said Acts, by sales in manner aforesaid, with reference to the said purpose of the General Assembly, and of the Mayor and City Council of Baltimore. And your orators give your honor to know, that Solomon Hillen, who by said original Act was appointed one of said commissioners, resigned his said office, and that Oliver Holmes, your orator, was duly appointed a commissioner in his place, giving bond with approved security, as did each of your orators, according to the requirements of said Acts of Assembly. And your orators suggest, that being thus the constituted agents of an undertaking of much public importance, and which it is the view of the State of Maryland and of the Mayor and City Council of Baltimore to have accomplished as promptly as may be, and for which it is the policy and intent of said

5 Acts, that means should be *procured as largely and surely as practicable, your orators are specially interested in seeing maintained all the restrictive provisions of the law and Constitution of Maryland touching the privilege of lotteries. And now your orators show, that certain officers, by virtue of enactments of the General Assembly of Maryland, have been from time to time appointed, and now are officiating, called commissioners of lotteries, representing the State in reference to the revenue derivable to her from drawings of lotteries and sales of schemes, and licenses for selling lottery tickets, whose duties however, are particularly defined and prescribed in the several relevant Acts of Assembly, to which in that respect your orators refer; your orators showing, that the actual commissioners now are, Michael McBlair and George Cooke. Your orators further show, that by the first section of the Acts of the General Assembly of Maryland, passed at December Session, 1831, chap. 79, entitled, An additional supplement to an Act to amend the lottery system, the said commissioners are empowered to grant at any time after the passage of said Act, a license or licenses to any person or persons, to be in force for one year from the date of the grant thereof, to sell not only tickets in any scheme or schemes of a lottery or lotteries which the said commissioners shall form and dispose of, or authorize for the benefit of the State, but also to sell tickets in any scheme or schemes of a lottery or lotteries granted by any of the States of the Union, or by the United States of America, and submitted to and approved by said commissioners, it being further provided, that the person or persons so licensed, shall at or before the obtaining of the licenses, contract with the commissioners aforesaid, for the right to draw a scheme or schemes of a lottery or

lotteries within the year for which the license shall be granted, which scheme or schemes shall produce to the State, at least the sum of fifteen thousand dollars within said year. And your orators now state, that in pursuance of the provision of law just recited, the commissioners of lotteries have habitually made contracts with certain individuals, for the benefit of such individuals, of certain schemes of lotteries, devised or approved by * the commissioners in behalf of the State; and with reference to the yearly profit of at least fifteen thousand dollars, contemplated to be assured to the State by the terms of the Act referred to; such schemes being thus created and operative for the benefit of the State of Maryland; and the fruit and profit thereof commuted by the contracts aforesaid, made by the commissioners as aforesaid, with certain individuals. And your orators show further, that conformably to said Acts of Assembly, the commissioners of lotteries have been accustomed to grant licenses to said contracting individuals, authorizing them or their assignees of the licenses, to sell tickets of lotteries of the State as aforesaid, or of foreign lotteries of other States, or of the United States, within the scope of the provision already hereinbefore set forth, as to those licenses. And your orators state and charge, that under licenses so granted by the commissioners of lotteries, and under color of the said Act of Assembly, tickets have ever since the passage said Act been sold, and are now selling within the City of Baltimore and in the State of Maryland at large, in schemes of lotteries for the State's use as aforesaid, and of lotteries granted and sanctioned by only other States of this Union, or by the United States of America, such sales being made not only by the contracting individuals, and the grantees of the State of the said licenses, by numerous assignees of said licenses, under transfer of them respectively from said contractors. And your orators further show, that the contractors aforesaid, for the disposal of said licenses, and for the sale of tickets to those using the licenses aforesaid, as grantees of said contractors, have customarily had, and now have, agents in the City of Baltimore, such agents receiving from the commissioners of lotteries the tickets of the various schemes; that the commissioners have approved for the dealing of said contractors and the holders of said licenses, the tickets so delivered, being stamped by said commissioners in token of the approval of the schemes, as required by the Act of Assembly aforesaid, of the year 1831. And your orators state, that the persons who have contracted as aforesaid with the commissioners of lotteries, and have so contracted since the tenth day * of March, in the year 1841, the day of the passage by the said General Assembly of the Act hereinafter mentioned, entitled an Act to confirm an Act entitled, an Act to alter and amend the Constitution, so far as it relates to the power of the Legislature to grant lotteries, passed at December Session, 1839, chap. 31, are J. G. Gregory and other persons, to your orators unknown,

composing the partnership of J. G. Gregory and Company; and that the agents aforesaid of said contractors, acting and managing for them, in manner aforesaid, in the City of Baltimore, are Samuel Scribner, and William Pyfer and Henry M. Bash, doing business as such agents and managers, under the style of partnership, of S. Scribner and Company. And your orators state and charge, that at the December Session of the year 1839, the General Assembly of Maryland, contemplating the evils of unlimited lottery dealings, and of the multiplied lotteries agitating and alarming the community, and absorbing their means in many instances, to be diverted to objects of other States, and to be accomplished beyond the borders of Maryland, and repudiating as a source of revenue to the State, the fruits of such inordinate dealing, struck from the ordinary powers of Legislature the sanction of lotteries, by passing the Act entitled an Act to alter and amend the Constitution, so far as relates to the power of the Legislature to grant lotteries, declaring, that from and after the confirmation of that Act by the succeeding Legislature, "no new grant should be made to authorize the drawing of any lottery, or the traffic or dealing in lottery tickets, or schemes or devices in the nature of lotteries, or the distribution of money or property by chance;" and your orators state, that at the next succeeding session of the Legislature, on the tenth day of March, in the year 1841, by an Act entitled as above, an Act to confirm the aforesaid Act of the Session of 1839, chap. 31; the Act aforesaid forbidding to the Legislature the power of lottery grants, was confirmed and made part of the Constitution of Maryland; and the State itself, disabled from continuing the practice of lottery dealing, and drawing to the treasury the premium of the mischief which the Constitution thus marked and denounced. But your orators charge, that *notwith-

8 standing this constitutional condemnation and inhibition, the commissioners of lotteries, although the agents of the State, who has thus interdicted herself the privilege and profits of lotteries, have nevertheless, in continuance of the evil repudiated by the Constitution, entered into contracts of the same scope as those permitted before this constitutional ordinance, and have approved and allowed to be availed of, (and allowed tickets therein to be sold under the licenses as aforesaid,) schemes of lotteries for the State of Maryland, and schemes of lotteries granted and authorized above by other States, and have stamped as aforesaid tickets in such schemes, and issued them to the contractors or their agents aforesaid, which contractors and agents your orators have above named. And your orators aver and charge, that by sanction as aforesaid by said commissioners of lotteries, and by the instrumentality of said contractors and said agents, and under pretext of the licenses aforesaid, emanating from said commissioners of lotteries, schemes are every week approved for State lotteries aforesaid, and of lotteries granted and authorized above by other States, and tickets are largely and busily sold under

many licenses issued as aforesaid, by said commissioners of lotteries to said contractors, and from them passing to the numerous grantees of the licenses, said commissioners stamping and authenticating thus or by signature, the tickets so set afloat; and thus affording every ostensible warrant and all encouragement to a transgression of a solemn constitutional rule, and misinterpreting and exceeding the limits of their constitutional duty, as agents of the State. And your orators aver and charge, that by such action of said commissioners of lotteries and of the agents and persons aforesaid, not only is that social injury done which the Constitution so studiously sought to avert, but the undertaking to which, as aforesaid, your orators have been appointed as representatives of important purposes of the State and of the City of Baltimore, and which the State seeks to promote, has been seriously retarded, and its interests much prejudiced; and your orators aver and charge, that the project aforesaid of the State, over which they, as aforesaid, preside, must, be long delayed, if not * utterly intercepted for its accomplishment, if the unconstitutional procedure aforesaid, of which 9 your orators now complain, be not arrested. All which is much to the grievance of your orators; in tender consideration whereof, and forasmuch as no effectual remedy can be afforded in the premises, except in this honorable Court.

To the end, therefore, that said Michael McBlair and George Cooke, and said J. G. Gregory and the other persons, his partners as aforesaid, and Samuel Scribner, and Henry M. Bash, and William Pyfer, may on oath, answer the premises, and that said McBlair and Cooke, commissioners as aforesaid, may be perpetually enjoined from approving any schemes of any lotteries granted by any of the States of the Union, or by the United States of America, and from devising and approving, and authorizing the drawing of any schemes of lotteries for the State of Maryland and the benefit thereof, as contemplated by the said Act of Assembly, passed at the session of the year 1831; and that said McBlair and Cooke, as commissioners, be so enjoined from countersigning or stamping, or by any mark or token whatsoever, approving or authenticating any tickets in any schemes of any lotteries as aforesaid, granted by other States than Maryland, or by said United States, or in any schemes devised by, or proposed to, or approved by said commissioners, for the benefit of the State aforesaid; and further, that said Scribner, and Bash, and Pyfer, be perpetually enjoined from issuing or delivering, or selling or disposing of, or in any wise parting with any tickets of any lottery or lotteries granted by another State than as aforesaid, or by said United States, whether such tickets be or be not approved or stamped or countersigned by said commissioners, or either of them, and whether the schemes of such lotteries be or be not approved by said commissioners; and in like manner that they be so enjoined in respect of any lotteries or schemes or tickets thereof, or therein devised or

approved by said commissioners of lotteries, for the benefit of the State of Maryland as aforesaid; and further, that said J. G. Gregory and the other persons, his partners as aforesaid, be in like manner perpetually *enjoined in respect to any such lotteries or schemes or tickets, therein and thereof, as to which such injunction is above prayed and suggested against said Scribner, and Bash, and Pyfer; and that your orators may have such further and other relief in the premises as to your honor may seem right. Subpoena and order of publication, &c. The bill was sworn to by three of the complainants.

On which bill the Chancellor [BLAND] passed the following order:

The State not being represented by its Attorney-General, being made a party, no injunction can be granted as prayed by the foregoing bill of complaint.

Afterwards, on the 8th December, 1841, the complainants filed in the said cause the following order of the Honorable STEVENSON ARCHER, one of the Judges of the Court of Appeals:

"Upon the foregoing proceedings, it appearing to me that the Chancellor has erred in refusing to grant the injunction prayed for, it is ordered this 7th day of December, 1841, that the Register in Chancery, do issue the injunction as prayed in the bill, upon the complainants, or some of them, executing a bond with security to be approved by the Chancellor, in the penalty of five thousand dollars, conditioned to prosecute their injunction with effect, and pay and satisfy the defendants all costs to which they may be subjected by said injunction, and also pay and satisfy all damages which they or either of them, or the State may sustain by the granting and continuance of this injunction."

Afterwards, upon the petition of the complainants, the said Judge of the Court of Appeals approved of an injunction bond, &c., and directed the Register of the Court of Chancery to issue an injunction as prayed in the complainants' bill.

In pursuance of the said order, an injunction was issued in the usual form.

The defendants appeared and filed their answers. But as those answers are not referred to by the opinion of this Court in its disposition of the cause, the reporters deem it unnecessary *to publish them. Upon motion at the usual time, His Honor the Chancellor, dissolved the injunction, and the complainants having obtained an order from His Honor, ARCHER, Judge, prosecuted the appeal to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER DORSEY, CHAMBERS, and SPENCE, JJ.

Nelson, Mayer, and R. Johnson, for the appellants.

McMahon and W. Schley, for the appellees, cited * 11 G. & J. 515, &c.

STEPHEN, J. delivered the opinion of the Court. The decision of four questions will we think cover the whole ground of controversy in this case. Those questions involve—

The right and jurisdiction of the Court to grant the preventive process of an injunction, as an appropriate remedy to arrest the mischief of which the appellants complain :

The true construction of the constitutional amendment inhibiting lottery grants and the dealing in lottery tickets in this State :

The competency of the complainants in point of interest, to sustain the suit, and—

The propriety of the State's being represented by its Attorney-General, as a necessary party to the proceeding.

In reference to the first question, we think that a Court of equity was the proper tribunal to take cognizance of the case ; and that the prohibitory process of an injunction was the proper remedy to arrest the *gravamen*.

The difficulty of obtaining adequate redress in a Court of law, is one of the well established grounds for resorting to a Court of Chancery ; and more especially, where it may be necessary, in the pursuit of justice, to institute a multiplicity of actions for that purpose. The injury complained of in this case would necessarily lead to that result, if redress should be sought in a Court of common law jurisdiction ; and it is mainly upon that ground, that an injunction is held to be the proper remedy, to secure to a party the enjoyment of a statute privilege, where it is of an exclusive character, and does not admit of any injurious competition. In 1 *John Rep.* 615, Chancellor Kent says, "it is settled that an injunction is the proper remedy to "secure to a party the enjoyment of a statute privilege, of which he is in the actual possession, and when his legal * title is not put in doubt. The English books are full of cases arising under **13** this head of equity jurisdiction." In the same case, he says : "The equity jurisdiction in such a case is extremely benign and salutary ; without it, the party would be exposed to constant and ruinous litigation ; as well as to have his right excessively impaired by frauds and evasion." It is true the right, which the complainants seek to protect from violation in this case, is not one absolutely and entirely exclusive in its nature, but it possesses the quality and attribute of exclusiveness, at least to a qualified extent ; and sufficiently, so we think, to render the principle and practice, upon which the equity jurisdiction is founded, not inapplicable. It is moreover not unworthy of consideration, that the jurisdiction of a Court of equity to apply a preventive remedy in this case, has, to a considerable extent, received the sanction of the Legislature in the Act of 1828, chap. 129, sec. 21, where they direct an injunction to be obtained, to prevent or restrain the drawing of lotteries, which may be unauthorized by the laws of this State. The remedy by injunction, is there spoken of, as one already in existence, and not for the first time given or

created for the purpose by that Act. In a case of ordinary trespass, remedial justice, in the shape of damages, is only to be obtained in a Court of law; but it is now settled, that where the injury would be irreparable, or to prevent a multiplicity of suits, the interference of a Court of equity may be obtained to stay the mischief by the preventive process of an injunction. See 6 *John O. Rep.* 499. In this case Chancellor Kent observes, that Lord Eldon said in 7 *Ves.* 305, that the law as to injunctions, had changed very much, and they had been granted much more liberally than formerly. We think, therefore, that under the peculiar circumstances of this case, considering the difficulty of obtaining adequate redress at law, and the probability that a multitude of suits would necessarily be instituted to protect the complainants' franchise, supposing it to exist, (which upon the present occasion must be assumed to be the case,) the process of an injunction was properly applied to arrest the mischief of which the appellants complained, and that a Court of equity had jurisdiction to grant the writ.

14 * The next question to be considered, is the competency of the complainants to file the bill to obtain the interference of a Court of equity, to protect them in the use and enjoyment of a statute privilege, of which they were trustees for great and important public purposes.

By the Act of Assembly under which they received the appointment of commissioners, they were invested with a highly responsible public trust; the due and faithful execution of which depended upon maintaining inviolate, the lottery privileges which had been granted to those for whom they were constituted agents, with full power and authority to act in that capacity. A large sum of money was to be raised by the lottery grant, to enable them to accomplish the object of their appointment, and in the language of the law, full power and authority were given to them for that purpose. To enable them to execute this important trust, all the appropriate means necessary to that end ought to be considered as incidentally granted, so far at least as the necessity of making parties of their principles may be involved. As trustees clothed with an important trust, we think they had a sufficient interest in the subject-matter of the suit, to enable them to file a bill for the purpose of obtaining an injunction.

According to the principles of equity jurisprudence, it is not necessary in all cases, that the *cestui que trust*, or parties beneficially interested, should be parties to the suit. A familiar instance to the contrary exists in the case of executors and administrators, who may sue or be sued, as sufficiently representing the creditors, legatees, and distributees, for whom they are trustees. In *Story's Eq. Plead.* 138, it is said: "It has been well remarked by an eminent author, in many cases, that the expression, that all persons interested in the subject must be parties to the suit, is not to be understood as extending to all persons who may be consequently interested. In all cases

of bills by creditors, and legatees, the persons entitled to the personal assets of a deceased debtor, or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to contest the demands of * the creditors and legatees."

In page 139, the same author remarks: "Perhaps the true explanation of this doctrine is, that in cases of this sort, Courts of equity proceed upon the analogy of the common law, which treats the personal representative of the deceased debtor or testator as the regular representative of all the persons interested in the personal assets, and bound by his *bona fide* acts, so far as third persons are concerned. If so, the doctrine stands upon a very intelligible and reasonable footing; and we shall presently see, that in this view, it is not peculiar to this class of cases. And this leads us in the next place to suggest, that Courts of equity do not require that all persons having an interest in the subject-matter, should under all circumstances, be before the Court as parties. On the contrary, there are cases in which certain parties before the Court are entitled to be deemed the full representatives of all other persons, or at least so far as to bind their interests under the decree, although they are not or cannot be made parties. Thus, for example, where real estate had been purchased by a joint fund, raised by a subscription in shares of more than two hundred and fifty subscribers, and the property had been conveyed to certain persons as trustees for the subscribers; and afterwards a bill was brought against the trustees for the sale of the real estate, under a mortgage made in pursuance of the trust, it was held, not necessary for the subscribers to be made parties to bill; for the trustees, by the very nature and constitution of such a trust, must be held sufficiently to represent the interest of all the subscribers, and a different doctrine would be attended with intolerable hardship and inconvenience, as it might be impossible to make all the subscribers parties." So, in page 171, the principle is stated to be in accordance with the above doctrine, that, "where a mortgagor has conveyed his equity of redemption to trustees, for the benefit of his other creditors, the trustees alone are generally the proper parties to a bill to redeem; and not any of the creditors entitled under the trust." We therefore think, that under the circumstances of this case, the complainants, * as trustees invested with full and plenary power to execute the undertaking confided to their management, **16** had a competent standing in Court, to ask for and to obtain the injunction which was granted in this case.

The objection that the State ought to have been a party to the proceeding, is of no avail at the present stage of the suit. In other words, it is no ground upon which to claim a dissolution of the injunction. If a necessary party to the cause which it is now not necessary to decide, that defect may be supplied at any time before the final hearing. It is true, it is in all cases the constant aim and object of Courts of equity to do complete justice, by deciding upon

and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented, and a decree made which shall bind all; but this object may be attained by having the necessary parties brought before the Court at any time before the final decree is passed in the cause. And if all persons interested are not made parties to the suit, the Court many times, upon hearing, will not for want of them, proceed to a decree. See *Wyatt's Chan.* 299.

There remains but one other question to be considered and decided to make a final disposition of the matters in controversy in this case; and that is, the construction which ought to be given to the constitutional amendment upon the subject of lotteries.

We have no doubt, that it was the object and policy of the Legislature, in adopting that amendment, to prohibit in future, not only all lottery grants by the Legislature, but all grants of licenses to deal in lotteries by the Lottery Commissioners, so far as it could be done, without affecting antecedent or prior vested rights, secured by a constitutional sanction. In confirmation of this construction, we would remark, that as early as the year eighteen hundred and thirty-five, they expressed an anxious desire that the lottery system should expire at as early a day as practicable, and to effectuate that desire,

and extirpate * the whole system, the constitutional amendment was, we think, subsequently adopted.

By the Act of 1831, ch. 79, the Commissioners of Lotteries are authorized to grant licenses to sell tickets, either in foreign or domestic lotteries, to be in force for the term of one year from the date thereof; and by the Constitutional amendment, which originated in 1839, ch. 31, and was confirmed in 1840, ch. 261, it is provided, that "no new grant shall be made to authorize the drawing of any lottery or the traffic or dealing in lottery tickets, or schemes, or devices in the nature of lotteries, or the distribution of money or property by chance." This language, we think, is too explicit to be misunderstood. The term grant is used indiscriminately as applicable, not only to the drawing of lotteries, but to licenses to sell tickets in any scheme or schemes of lotteries which shall be approved by the said commissioners. The prohibition, therefore, was not exclusively confined to grants of lottery privileges by the Legislature, but was manifestly intended to cover the whole system of dealing in lotteries, and to prohibit likewise the granting of licenses to sell tickets by the Lottery Commissioners, and the sale of schemes by them. No other construction would, we think, be warranted by the terms used, or be calculated to carry into effect the policy and design of the Legislature in adopting the Constitutional amendment. The object to be accomplished was the suppression of a great moral evil, and to effect so praiseworthy and laudable a purpose, the construction should be a benign and liberal one. A limited interpretation of the

Constitution, confining the prohibition to legislative grants, whilst it would be inefficient and inoperative in alone suppressing the mischief, by leaving the door still open to foreign lotteries, would at the same time impute to the Legislature the folly and absurdity of accomplishing the contemplated object only by halves. It is true, the title of the Act is calculated to give countenance to such a confined and limited construction—"it is to amend the Constitution so far as relates to the power of the Legislature to grant lotteries." But the title of the Act, and the preamble * to the Act, are, strictly speaking, no part of it, though they may be resorted to in explanation of the enacting clause, if it be doubtful; or to restrain its generality, when it would be inconvenient if not restrained. This is the whole extent of the influence of the title and preamble in the construction of a statute. See 1 *Kent's Com.* 460, 461. The same author says, that "the true meaning of the statute is generally and properly to be sought from the body of the Act itself." Looking therefore in this case to the body of the Act for the meaning of the Legislature, we think that their intention is too clearly expressed to admit of controversy; and that such intention was a total suppression in future of all lottery grants by the Legislature; and of all licences to deal in lotteries by the Lottery Commissioners, or sales of schemes by them. In adopting the Constitutional enactment of 1839, it was not the design of the Legislature to interfere with existing private lottery grants, or to restrict or impair the powers it before possessed of regulating the same, or modifying or changing the means or mode by which such grants might be more effectually or speedily accomplished. Such legislation would promote rather than conflict with the constitutional provision, and tend to hasten the epoch when to draw a lottery in Maryland was no longer tolerated by law.

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Order reversed, and cause remanded.

PHALEN & MORRIS *vs.* THE STATE OF MARYLAND.—December Term, 1841.

By the Act of 1816, chap. 89, the Visitors and Governors of W. College were authorized "to propose a scheme or schemes of a lottery for raising a sum not exceeding, &c. clear of all expenses, and to dispose of, or sell all or any of the tickets of said lottery or lotteries, and to draw the same, or to authorize any other persons to draw the same." &c.

By the Act of 1821, chap. 16, the V. and G. of St. J's College were authorized "to propose a scheme or schemes of a lottery or lotteries for raising a sum not exceeding, &c. and to sell such scheme or schemes to any * persons whatsoever, and the purchaser or purchasers thereof, are hereby empowered to sell and dispose of the tickets in the said lottery or lotteries."

19

Upon these Acts it was held—

14 PHALEN & MORRIS *vs.* THE STATE.—12 G. & J.

1. The assignees, of the V. and G. of the Colleges, of the franchises created by those Acts; possessed no greater powers than their assignors.
2. The terms of those Acts are unambiguous.
3. They communicate an authority to propose a scheme or schemes for raising a limited amount.
4. When the schemes for raising that amount have been proposed and drawn, the authority given by those Acts has performed its office, whether the letter of the Act or the legislative intent is regarded.
5. It was the intention of the Legislature, that the sum specified should be raised; it gave adequate means for its accomplishment; it was the duty of the owner of the schemes, in the exercise of his franchise, previously, to drawing such schemes, to have sold all the tickets. In that mode was the amount authorized to be raised.
6. It being admitted that if all the tickets had been sold, in the schemes which have been drawn under the Acts of 1816 and 1821, that a larger amount would have been raised than was authorized by them, the franchise thereby created was held to be exhausted.

The Act of 1817, chap. 154, declaring the effect and construction of previous lottery grants, so far as to show under what circumstances those grants shall be deemed exhausted, must be regarded as of overwhelming influence in the decision of similar questions arising under grants made subsequent to its passage.

Where parties claim to exercise a lottery privilege, under a grant which in point of law is exhausted by proceedings under it, the parties so claiming and acting may be restrained by injunction.

APPEAL from the equity side of Baltimore County Court. On the 18th February, 1840, the State of Maryland exhibited its bill of complaint, alleging that heretofore, to wit, by an Act of Assembly, passed at December Session, 1816, and entitled "An Act to authorize a lottery or lotteries to raise a sum of money for the purpose of repairing, and raising a sum of money for the use of Washington College," and by two several supplements thereto, the one passed at December Session, 1821, and the other at December Session, 1823; and also by a further and other Act of Assembly, passed at December Session, 1821, entitled "An Act for the benefit of St. John's College," certain powers were conferred on the governments respectively of Washington College on the Eastern, and St. John's

20 College * on the Western Shore, and among them the power to dispose of the schemes of lotteries thereby authorized; and that a certain Palmer Canfield, of the City of New York, in the year 1824, made contracts with the said governments severally, for the purchase or use and enjoyment, in whole or in part, of the lottery privileges granted them by the Acts of Assembly aforesaid; and that the schemes by him submitted for approval, and approved under said Acts, being twelve in number, amounting in all to one million five hundred and forty-nine thousand seven hundred and sixty-five dollars, and that ten of said schemes, amounting to six hundred and eighty-seven thousand three hundred and sixty-five dollars, were drawn by himself or his agents, or by the Commission-

ers of Lotteries for him, and at his instance; and that the two remaining schemes, amounting to eight hundred and sixty-two thousand four hundred dollars, were either drawn by him or his agents, or if undrawn, are so by reason of the negligence, default and fraud of the said Canfield, in this behalf, who made sale of, and received the money for a large number of the tickets in said two last mentioned schemes, more than fourteen years since. The said State further sheweth to your honors, that the prizes in each of the schemes submitted by, and approved for, said Canfield aforesaid, and by him advertised, amounted to the sum which would have been raised by the sale of the whole of the tickets in such scheme, and that each and every ticket issued in each of said schemes, contained upon its face a stipulation that the holder should submit to a deduction of fifteen per. cent. from such prize as it might draw. And the said State also sheweth to your honors, that the whole sum of one hundred and sixty thousand dollars, authorized to be raised by the Acts of Assembly aforesaid, with the expenses legally chargeable in addition, was raised by the said Canfield, under the schemes aforesaid, and certain other schemes, amounting to three hundred and eighty-three thousand seven hundred and forty-five dollars, drawn in fact on his account by Yates and McIntyre, of New York, and that the lottery privileges by said Acts granted, were by him exhausted and extinguished. And *the said State further sheweth to your honors, that the said Palmer Canfield, in addition to the **21** schemes of lotteries by him submitted for approval, and approved, including those already stated to have been drawn in fact on his account, did advertise and draw in the State of Connecticut, through his agent, one Dana, of the firm of Paine, Burgess & Dana, certain other schemes of lotteries to an amount to the said State unknown, but believed and charged to be upwards of one hundred thousand dollars, purporting to be authorized by the Acts of Assembly aforesaid, but which were never by him or said agent submitted for approval, or approved, according to the requirements of said Act in that behalf. And the said State further sheweth to your honor, that the only surety in the bonds required by the Acts aforesaid to be given by the purchaser of the schemes of lotteries thereby authorized, and which were given in conformity by said Palmer Canfield, is either dead, insolvent, or resides without this State, and that no other person than said Canfield has given or tendered any bond as purchaser, or in any other capacity, under said Acts, except Yates and McIntyre, for the amount drawn by them as hereinbefore stated. And the said State further sheweth to your honors, that the said State, on the 20th of November, 1829, recovered judgment against the said Palmer Canfield, for the sum of sixteen thousand five hundred and sixty-eight dollars, in the Circuit Court of the United States for the second circuit, in and for the Southern District of New York, in an action of

assumpsit in said Court, instituted on the last Monday of October, 1828, after which, to wit, some time in the year 1833, the said Palmer Canfield died insolvent, leaving the said judgment wholly unsatisfied. And the said State further sheweth to your honors, that a certain Robert B. A. Tate, of the City of Baltimore, hath obtained letters of administration from the Orphans' Court of Baltimore County, upon the personal estate of the said Palmer Canfield; and that on the 17th of February, 1840, an action of debt was instituted, and is now pending in Baltimore County Court against the said Tate, as such administrator, upon the judgment aforesaid, by Michael McBlair,

22 *Samuel S. Dickinson and George Cooke, Esquires, the said State's Commissioners of Lotteries. The said State also sheweth to your honors, that James Phalen and Francis Morris, partners under the firm of James Phalen and Company, falsely alleging themselves to be entitled to the lottery privileges granted as aforesaid, by virtue of pretended assignments thereof from the said Palmer Canfield, through a certain Felix Pascuales, of New York, his pretended immediate assignee, propose and offer to draw, on the 18th of February, 1840, in the City of Baltimore, the scheme of a lottery authorized (as they aver in their advertisement thereof, which they have caused to be inserted in one or more of the daily papers published in the City of Baltimore, and a copy of which is herewith filed, which it is prayed may be taken as a part of this bill.) by Acts of the General Assembly of Maryland, for the benefit of Washington and St. John's Colleges, and which said scheme has never been submitted for approval, or been approved by the Commissioners of Lotteries. And the said State further sheweth to your honors, that the pretended assignment aforesaid, from the said Canfield to the said Pascuales, (who was the father-in-law of said Canfield, a doctor of medicine, in no wise acquainted with, or engaged in the lottery business, either at that time or before or after, and of narrow means,) was made, if at all, without consideration, and fraudulently, to defeat and delay the judgment aforesaid, and execution thereon. And the said State further sheweth to your honors, that the said Canfield had no power by the Acts aforesaid, or the action under the same, of the governments of the colleges aforesaid, to make any assignment of his purchase from said governments, in the form which he is falsely alleged to have adopted, or in any other form; and that the said Canfield never did make any such assignment to the said Pascuales, or if he did, that the said Pascuales never did make assignment to the said Phalen and Morris, of any interest derived by him in the premises from said Canfield, and that the said Phalen & Morris are not the assignees, in law or in fact, of any rights acquired by said Canfield, under his purchase aforesaid, or of any of said rights

23 *pretended to have been communicated by him to the said Pascuales. And the said State further sheweth to your honors, that the said Felix Pascuales, the pretended immediate assignee of the

said Palmer Canfield, hath departed this life, and that no letters testamentary or of administration upon his estate, have been granted in this State. And the said State also sheweth that no power was conferred, or could or can be exercised, under the Acts aforesaid, to propose or draw any scheme of a lottery purporting to be jointly authorized by the grants made severally as aforesaid, to Washington and St. John's Colleges. And the said State further sheweth to your honors, that Michael McBlair, Samuel S. Dickinson and George Cooke, Esquires, the State's Commissioners of Lotteries for the present time being, believe that the scheme of a lottery, proposed and offered to be drawn as aforesaid, is unauthorized by the laws of this State. In tender consideration whereof, and inasmuch as the appropriate remedy of the said State in the premises is in equity,—To the end, therefore, that the said James Phalen and Francis Morris, and Robert B. A. Tate, may full, true and perfect answers make, on their several and respective corporal oaths, to all and singular the premises, and that as fully as if thereto specially interrogated; and that by this honorable Court it may be adjudged, ordered and decreed, that the said James Phalen and Francis Morris, and their agents and servants, be perpetually enjoined and restrained from proposing or offering to draw, or drawing or disposing of any scheme or schemes of lotteries, under and by virtue of the Acts of Assembly aforesaid, and that the said State may have all such other and further relief in the premises as the case hereinbefore set forth shall in equity demand.

The said State respectfully asks that the Court here do grant, as well the State's writ of injunction (pursuant to the direction of the 21st section of an Act of Assembly, passed at December Session, 1828, entitled, "A supplement to an Act entitled, an Act to amend the lottery system,") to the said James Phalen and Francis Morris to be directed, strictly commanding and enjoining them, their servants and agents, from proceeding in * the drawing of the lottery by them offered and proposed to be drawn in the City of Baltimore, on the 18th day of February, 1840, and purporting to be so offered and proposed by authority of Acts of the General Assembly, for the benefit of Washington and St. John's Colleges, till their right to draw the same can be determined; and also the State's writ of subpoena, &c. 24

Upon this bill the County Court ordered an injunction to issue.

The joint and separate answer of James Phalen and Francis Morris alleged, that it is true as stated in said bill of complaint, that by the various Acts of Assembly in said bill mentioned, certain lotteries were authorized to be drawn, in order to raise funds for Washington and St. John's Colleges, and by said Acts the governments of said colleges were authorized, either to draw said lotteries or to sell the right of drawing the same to any other person or persons whomsoever. And these respondents further admit, that the right of

raising the sums of money in said Acts mentioned, was duly and regularly assigned, for value received, to Palmer Canfield, of the City of New York. And these respondents further answering, admit, that said Canfield submitted for approval to the Governor and Chancellor of the State, the system of schemes of lotteries, amounting to a large sum nominally, and these respondents admit that ten of said schemes, amounting in the gross to the sum of six hundred eighty-seven thousand three hundred and sixty-five dollars, were drawn by said Canfield or his agents, but these respondents deny that any other schemes were drawn by said Canfield, and they also deny that tickets to any extent, in any other schemes, were sold by him or his agents; and they also deny that any of such tickets of the few which were sold, remains outstanding, unless they be in the hands of dealers who never paid for them, Canfield having redeemed all which were paid for. And these respondents further answering admit, that the prizes in each of the schemes submitted by, and approved for said Canfield, and by him advertised, amounted to the sum which would have been raised by the sale of the whole of the tickets in such scheme, and that each and every ticket

25 * issued in each and every scheme, contained upon its face a stipulation, that the holder should submit to a deduction of fifteen per cent. from such prize as it might draw; but these respondents expressly deny, that either one hundred and sixty thousand dollars, or any other sum exceeding thirty thousand dollars, was raised, either by said Canfield or by any person drawing lotteries under the aforesaid grants, so assigned as aforesaid to said Canfield, including the drawing of Yates and McIntyre and Francis W. Dana; but these respondents verily believe, that said Canfield made large losses by such drawings, never having sold one-third of the tickets in said schemes, and several very high prizes having been drawn by holders of said tickets sold as aforesaid; and in confirmation of this denial, these respondents state, that from the 1st of December, 1838, to the 1st of December, 1839, schemes were issued by the Commissioners of Lotteries for this State, amounting to about five millions of dollars, from which they derived but about twenty thousand dollars; and further, that said commissioners require of the contractors for such schemes, merely an allowance of five per cent. upon the tickets sold, and not upon the gross amount of the schemes. And these respondents utterly deny, that the lottery privileges by said Act granted, have been exhausted or extinguished. And these respondents further answering, admit, that under such grants Yates & McIntyre drew several schemes, amounting in the gross to three hundred eighty-three thousand seven hundred and forty-five dollars, for which said Yates & McIntyre paid said Canfield eight thousand dollars, and no more; and they also admit, that Dana did draw one scheme, and no more, and that the gross profits were three hundred forty-eight dollars and seventy-five cents, and no more. Whether

such last drawing took place on the approval of the Commissioners of Lotteries, these respondents do not know, and cannot therefore admit or deny. And these respondents admit, that no other security, except that given by Canfield and Yates & McIntyre, has been given, but aver that these respondents are ready and willing to file any bond with such satisfactory security as may be required by the *proper authorities. And these respondents further answering, admit the recovery of the judgment of the said State in the manner and at the time stated in said bill of complaint, and that said Palmer having been ruined by the loss upon the drawing of said lotteries, and other causes, died at or about the time stated, insolvent, not having satisfied said judgment; and they further admit, that letters of administration upon the estate of said Canfield, have been granted in Maryland to Robert B. A. Tate, the clerk of the Commissioners of Lotteries, who your respondents very believe obtained said letters under the direction, and at the instance of said commissioners or their counsel; and they also admit the pendency of said actions of debt against said Tate, as is alleged in said bill. And these respondents further admit, that they did propose and offer to draw the scheme of a lottery on the 18th day of February, now last past, but they deny that they falsely alleged themselves entitled to do so by virtue of any pretended assignments, but on the contrary aver, that they are *bona fide* assignees for valuable consideration of the grants to said colleges, and they herewith state the dates and times of such assignments, which they are ready to produce and prove, when and where this Court shall require. Palmer Canfield, on the 29th day of July, 1829, assigned to Felix Pascales the said grants, in trust to sell the same, and from the proceeds thereof to pay a debt due to said Pascales, and another one to James Raymond, with interest on such debts; that said Felix died, having first made his last will and testament, bequeathing all his estate to his son, Cyril O. Pascales, and also appointing him executor of such will; that said Cyril advertised and sold such grants at auction, to Alexander G. Anderson, and on the 19th day of February, 1834, assigned and conveyed the said grants to said Anderson; that on the 22nd day of February, 1834, the said Anderson conveyed the same to James Raymond, of the City of Baltimore, and on the 13th day of December, 1838, the said Raymond, for full value, assigned and transferred the same to these respondents, and these respondents verily believe, that all of said assignments were fairly made and for a *valuable consideration. And these respondents further answering, admit that the schemes by them proposed to be drawn, were not submitted for approval, or approved by the Commissioners of Lotteries, these respondents submitting that they were not by law bound to submit the same for approval to such commissioners, and these respondents well knowing that no scheme submitted by them would be approved. And these respondents further

answering, deny, that the assignment made by said Canfield to Felix Pascales was fraudulent, or without consideration, or fraudulently or otherwise to defeat and delay the aforesaid judgment rendered against said Canfield, or any other judgment. And these respondents insist, that said Canfield had the power of transferring the said lottery grants, and that these respondents are the assignees of such lottery grants; and these respondents admit, that said Felix Pascales is dead, and that no letters testamentary, or of administration, upon his estate have been granted in Maryland. And these respondents pray to be hence dismissed with costs.

After this, the cause was prepared for a final decree by admissions of facts and the filing of documentary proof, all of which, so far as is necessary to the understanding of the opinion and application of the principles decided in this Court, sufficiently appear in the opinion delivered in this cause. At the final hearing, Baltimore County Court [PURVIANCE, A. J.,] decreed that the defendants be, and are perpetually enjoined and restrained from proposing or offering to draw, or disposing of any scheme or schemes of lotteries under or by virtue of the Acts of Assembly in the bill in this cause mentioned.

From this decree the defendants appealed.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

G. R. Richardson and R. Johnson, for the appellants.

J. Mason Campbell and McMahon, for the appellees.

28 DORSEY, J. delivered the opinion of this Court. *It is admitted, that if all the tickets had been sold in the schemes, which have been drawn under the lottery grants in favor of Washington and St. John's Colleges, that a larger amount would have been raised than was authorized by the Acts of Assembly under which the drawings took place. But it is insisted on the part of the appellants, that notwithstanding the competency of the schemes drawn (had all the tickets been sold,) to have raised the sum of \$160,000, as authorized by the Legislature of Maryland, yet, that but a small portion of that sum was, in point of fact, realized, by reason of a great portion of the tickets remaining unsold when the schemes were drawn, and by the loss of the wheel, in the high prizes coming up to the tickets which had been sold.

The first question, then, raised for our determination, is, have the lottery grants in question been exhausted by the drawing of lotteries, competent, upon the face of the schemes; to have realized the prescribed amount, or, as contended for by the appellants, are the owners of the privilege at liberty thereafter to continue their drawings, until, by the gain of the wheel or the sale of tickets, the specified amount shall have been actually raised?

But the Act of 1816, chap. 89, and by the supplement thereto of 1823, chap. 193, the Visitors and Governors of Washington College are authorized to propose a scheme or schemes of a lottery or lotteries, for raising a sum of money, not exceeding eighty thousand dollars; and by the Act of 1821, chap. 46, the Visitors and Governors of St. John's College are authorized "to propose a scheme or schemes of a lottery or lotteries, for raising a sum of money not exceeding eighty thousand dollars." The assignees of the franchise possess no greater powers than did the visitors and governors of these colleges. The terms in which the authority is communicated to them, are clear and unambiguous, to wit, to propose a scheme or schemes for raising a limited amount; when the schemes for raising that amount have been proposed and drawn, the authority given has performed its office, according to the letter of the Acts of Assembly by which it is conferred. And if we * look to the legislative intent in passing those Acts, the construction we give **29** them is still more strongly fortified. But it is said that it was the design of the Legislature, that the sum specified should be raised. Doubtless, such was its intention. A failure to effect it was not within its contemplation. It had given adequate means for its accomplishment, had they been pursued in the contemplated mode. It was the duty of the owner of the schemes, in the exercise of his franchise, previously to their drawing, to have sold all the tickets. Upon this assumption only did the Legislature act. It did not design to confer a floating, gambling power, of indefinite duration, which should expand and contract with the gain or loss of the wheel. But the amount to be raised (in the absence of all subsequent legislation, providing a different mode of raising it, as for example, by the consolidation system, or any other mode that might be prescribed,) was to be obtained by a sale of all the tickets embraced by the scheme, in the manner it prescribed. That such was the legislative intent, we think apparent on the face of the lottery grants before us, but is clearly deducible from all prior and subsequent enactments upon the subject.

In requiring bonds to be given for the payment of prizes, it cannot be doubted that the Legislature believed it had provided ample security, in this respect, for the owners of prize tickets; upon no other terms would it have made the grants in question. What are the provisos upon which those grants were made by the Acts of 1821, ch. 46, and of 1821, ch. 224? They are that the purchaser or purchasers of such scheme or schemes, shall before the sale or disposal of any ticket or tickets in said lottery or lotteries, give bond to the State of Maryland, in the penalty of one hundred and sixty thousand dollars, to be approved by the Governor and Council, conditioned that he or they will well and truly apply so much of the money arising therefrom, within twelve months after the drawing of the said lottery or lotteries shall commence, as will satisfy the fortunate

adventurers for prizes drawn by them, and defray the necessary expenses incurred in the management * thereof. It is too clear **30** for argument or doubt upon the subject, that by the condition of those bonds, the obligors are no further bound than for the money arising from the sale of tickets. What then is the irresistible inference of the intention of the Legislature in making these grants? It is, that to warrant the drawing of a lottery, there must have been a sale of all the tickets in the scheme. Such being the apparent intention of the Legislature, upon every principle of sound construction we are bound to give an accordant interpretation to its Acts. To give to those lottery grants the exposition which has been claimed for them by the appellants, that the schemes may be drawn at the will of the purchaser, as soon as any portion of the tickets are sold, would impute to the Legislature a design to grant an almost interminable license to the most reckless, fraudulent system of gambling that could well be practised upon the thoughtless and unsuspecting. The inducement to such a system of gaming is too obvious to be overlooked. The purchaser after the acquisition of the grants, would have everything to gain, and could lose nothing. In the almost infinite series of schemes which he might draw, no tide of ill luck that could be anticipated, could prevent the filling of his coffers by unrighteous acquirements. The gain of the wheel in every scheme drawn was all his own; its losses were thrown on the owners of the prize tickets. He might gamble indefinitely at the risk of others; of his own, nothing was put to hazard.

That we have construed correctly the Acts of Assembly in question, we think demonstrated by the first section of the Act of 1810, chap. 154, which declares, "that in all cases where lotteries have been heretofore authorized, under which power is given to raise a particular sum of money by one or more lotteries, and the managers may have drawn a lottery or lotteries, the scheme of which purported to raise the sum authorized to be raised, that in all such cases the power and authority given to raise money thereby" is completed, and the power to draw any other lottery or lotteries under the same authority, at an end. If such were the legislative design in all previous like * enactments, upon what recognized principle of **31**

sound construction can you give a different interpretation to the Acts of Assembly now under consideration? And even conceding, as was slightly intimated in the argument, that this retrospective, declaratory law, is unconstitutional and void as to prior lottery grants, which otherwise would be differently construed, yet in all subsequent similar legislation, such a declaration of the will or intent of the Legislature must be regarded as of overwhelming influence, in the construction of its Acts, and such is the case before us.

Believing the lottery privileges, created by the Acts of 1816, chap. 89, and 1821, chap. 224, and 1821, chap. 46, to have been exhausted by the schemes which have already been drawn under said Acts, we

deem it unnecessary to examine the other questions which have been discussed in this cause.

The decree of Baltimore County Court, perpetuating the injunction issued in this case, is affirmed. *Decree affirmed.*

NATHANIEL CLARY vs. CORNELIUS GRIMES *et al.*—December, 1841.

The evidence taken under an *ex parte* commission, is not admissible against a defendant, who is brought into the cause by an amendment made in the plaintiff's bill, after the commission had issued.

The declarations of the assignee of a bond of conveyance, made while it was in his possession, and while he was the holder thereof, are evidence against a subsequent assignee of the same bond, who claimed title under the person who made such declarations. (a)

The holder of a bond of conveyance for a parcel of land, as assignee, made and delivered a deed, by which he conveyed to G. the land described in the bond; afterwards, to defeat G. and with a fraudulent intent to deprive his conveyance of its intended operation, he re-delivered the bond to the original obligee, when the assignment was erased and a new assignment endorsed to C. by the obligee. *Held—*

That under such circumstances, neither the first assignee, nor C. who in fact claimed under him, could seek in equity a specific execution of the contract as against the obligor, or defeat G's title.

* A defendant in resisting the claim of a complainant, is entitled to see that the Court keep within its established rules in determining the rights of the latter, although the defendant's conduct may have been harsh. **32**

APPEAL from the Court of Chancery. On the 22d day of March, 1833, Nathaniel Clary filed his bill on the equity side of Baltimore County Court, alleging, that Henry Howard of John, was on the 18th October, 1832, seized in fee of a part of a tract of land called Head Quarters, as described in the bill of complaint, and that he agreed with Philemon Welsh for the sale thereof, gave and delivered him his bond of conveyance, binding himself upon the payment of one hundred and fifty dollars to him Henry, before the 10th March, 1833, to make a good and sufficient deed of all his right, title and interest in the same; that also, on the 28th January, 1833, the said Henry Howard of John, did execute and deliver to the said Philemon Welsh, an instrument of writing, binding himself to convey any part of the above mentioned parcel of land described in said bond of conveyance, which might be found to lay in Baltimore County, upon the payment of the consideration mentioned in the bond of conveyance; that Philemon Welsh, on the 16th February,

(a) Approved in *Keener vs. Kauffman*, 16 Md. 308. See *Dorsey vs. Dorsey*, 8 H. & J. 315.

1833, assigned all his interest in the said bond to the complainant, who on the 9th March, 1833, exhibited his assignment to the said Henry Howard of John, offered to deliver up the same and pay him the said sum of \$150, and tendered him a deed, and that he refused to receive the money or execute the conveyance. Prayer for a specific performance of the contract; that Henry Howard of John, and Philemon Welsh be made parties, and for general relief.

Philemon Welsh appeared and confessed the facts charged in complainant's bill.

Henry Howard of John, being summoned and not appearing, an interlocutory decree was passed against him, and a commission ordered, which was issued on the 2d September, 1833, and closed on the 3d August, 1835.

On the 8th September, 1833, Henry Howard of John, petitioned **33** Baltimore County Court for leave to file his answer, and *an answer was filed, (the terms of this leave do not appear,) which admitted his contract with Philemon Welch, but alleged that Welch had assigned his contract to James Thomas; that Thomas sold to Cornelius Grimes; that subsequently to the assignment of said agreement, which was put on the back thereof, it was erased in part, and a new assignment made, whereby the rights under said agreement were attempted to be transferred to the said complainant, and the dates of said assignment fraudulently altered, and the matter placed, or attempted to be placed, in the same situation as though the said assignment to Thomas had never been executed. He also denied a tender at the time and in the manner stated, an exhibition to him of the bond of conveyance as stated, &c.

On the 20th November, 1833, the complainant petitioned for leave to amend his bill, in order to make Cornelius Grimes a party defendant, and to aver, that the assignment to Thomas, relied upon in the answer of Howard the defendant, was obtained by duress. On the 20th November, 1833, the County Court [PURVIANCE, A. J.,] passed the following order :

"Leave is granted to make Mr. Grimes a party defendant, "according to the prayer of the petition." And a subpoena issued for said Grimes on the 21st November, 1833, who being summoned, appeared and answered the bill, taking in substance the same defence as Henry Howard of John.

On the 14th April, 1834, the complainant suggested the death of Henry Howard of John, and a subpoena issued for his representatives, who were all summoned.

The defendants then by agreement waived all objections which might be taken to the testimony of Philemon Welch, examined as a witness for complainant, so far as they might arise from his examination without a previous order of Court. On the 29th June, 1835, an order was passed directing the commissioner to return the commission, which was closed in August, 1835.

On the 2d November, 1835, the cause was transmitted to Chancery. And on the 19th January, 1837, it being before the Chancellor [BLAND,] he ordered it to stand over with leave * to amend, as allowed by the order of the 20th November, 1833, and also **34** to amend so as to make James Thomas a party.

On the 17th April, 1838, the complainant filed his amended bill, praying subpoena against C. Grimes, James Thomas, Sarah Howard and others, representatives of H. Howard of John. The alleged matters of the original bill, and the pretended claim of Grimes through James Thomas, the assignee of Welch, who was not made a party to this amended bill, were stated in the bill as amended.

James Thomas answered the bill, and alleged that though he purchased from Welch, yet being unable to comply with his contract, he cancelled it, returned his contract to Welch, who gave him up his bond. He denied a sale to Grimes of any interest in, or any portion of that contract.

On the 24th January, 1840, it was agreed that the several answers filed should be taken as answers to the amended bill, as well as to the original bill.

The complainants excepted to the evidence of the declarations of James Thomas, as sought to be given in evidence by the defendants.

The defendant, Cornelius Grimes, also excepted :

1. To the competency of James Thomas and Philemon Welch as witnesses against him.
2. To the admissibility of the evidence of those two witnesses, and each of them.
3. To the admissibility of the deposition taken by complainant under the *ex parte* commission issued under the interlocutory order, because said defendant was not then a party to this cause.
4. To the admissibility of all hearsay evidence.

At December Term, 1840, the Chancellor [BLAND,] dismissed the bill, being of opinion that putting aside the depositions of the parties to this suit as coming from incompetent witnesses, and the mere hearsay detailed by other witnesses, the complainant has failed to sustain his claim to relief, by any legal and satisfactory evidence.

The complainants appealed to this Court.

* The cause was argued before BUCHANAN, C. J., ARCHER, CHAMBERS, and SPENCE, JJ. **35**

W. F. Giles, for the complainants. J. S. Lloyd, for the defendants.

ARCHER, J. delivered the opinion of this Court. As the commission *ex parte* under the interlocutory decree was ordered and issued before Grimes was made a party to the proceedings, we think the objection was well taken to the admissibility of the evidence against Grimes.

But we have, notwithstanding, examined the merits of the case upon the testimony taken under the commission, and we have arrived at the conclusion, that the complainant is not entitled to the relief he seeks. In this examination we have considered the declarations of Thomas, to whom the bond of conveyance from Howard was assigned, made before the erasure, and before assignment of the bond, by Welch, to the complainant, as evidence. The complainant derives his title to the bond of conveyance through Thomas, and any declaration made by Thomas, while he was holder of the bond, we consider as evidence against the complainant.

We are satisfied that Welch entered into the contract which is now sought to be specifically enforced with Howard, for the benefit of Thomas, and that he accordingly assigned the agreement to Thomas. While Thomas was thus in possession of the agreement by assignment, he executed a deed to Grimes, large enough by its terms to transfer any interest he had in the land affected by the agreement; and then to defeat Grimes, and with the fraudulent design to deprive the conveyance of its intended operation, he re-delivered to Welch the agreement to convey, when the assignment to Thomas was erased, and an assignment by Welch to Cleary was made in its stead. Under such circumstances, it is not perceived that Thomas could have (had he not assigned to Cleary,) any claim to a specific execution of the contract; nor do we see how Cleary, the complainant, could stand in any better situation. The established * rules which govern

36 Courts of equity in enforcing contracts, would forbid our interference in his behalf.

The complainant must stand or fall by the pretensions of Thomas, from whom he has in reality derived his pretended title, and has therefore in our judgment no claim to our interposition.

It has been objected that the conduct of Grimes has been harsh and oppressive. This may be so, but Grimes is not demanding the aid of Chancery to enforce a conveyance, but is resisting the claim of the complainant; and he is entitled to see that the Court keep within its established rules in determining the rights of the complainant.

Decree affirmed.

GILLESPIE, Administrator of HALL *et al.* vs. REBECCA E. CRESWELL *et al.*—December, 1841.

Upon a bill filed to sell real estate for the payment of debts, upon the ground of insufficiency of the personal estate of the deceased to satisfy them, the acknowledgment of the heir-at-law and devisee of the debtor, that "it was a debt he would have, and intended to pay," is sufficient to remove the bar of the statute.

The Statute of Limitations runs against a claim or debt up to the time it is exhibited or filed in Chancery. (a)

Where a claim arises upon a bond of indemnity, it is not barred until after the principal debtor and creditor have been both dead twelve years, or the thing in action has been above twelve years standing.

A party who relies upon a mere contract of indemnity has no right of action until he has been made to pay money. It is by payment he is damnified, and then his cause of action arises. (b)

Promissory notes, dated 10th March, 1814, at sixty days, were discounted for the use and accommodation of the second endorser, the prior parties being only securities. Suits were brought upon them by the holder against the securities in 1815, and judgments obtained against them in September, 1816. They were paid on the 20th August, 1818, more than three years after the maturity of the notes. The second endorser died in April, 1814. *Held—*

That as respects the accommodation endorser, the running of the statute was suspended by the suit brought against him, and the judgments obtained * thereon, and that the payment made by him on the 20th August, 1818, by coercion of law and under *fi. fa.* gave him a **37** right to be re-imbursed out of the real estate of his principal, upon a bill filed by him in 1819 against his heirs, and to which the Statute of Limitations opposed no bar.

It does not necessarily follow that one who advances money for a debtor to pay his creditor, and in fact pays the money to the creditor for the debtor, is either a purchaser of the debt or a mere volunteer. Upon the fact appearing, that the debtor had agreed to execute a mortgage for his security, and that the judgments against him should be assigned by way of security to the party making the advance, he would be considered as an agent in making the payment.

A mere volunteer, without any authority, undertaking to discharge a debt, does not succeed to the rights of the party whose debt he so discharges.

Where judgments were recovered against a principal and surety, and the surety paid them with money advanced by a third party, and then the plaintiff in the judgments assigned them to the surety, who assigned them to the third party making the advance, covenanting in the assignment that a pre-existing mortgage from the surety to the third party should be responsible for the advance, the third party will not be deemed the purchaser of these judgments, but will hold them as collateral security for his advance. The right to the judgments, (in a Court of equity,) is in the surety, subject to the equitable rights of the third party—the assignee. Therefore, a bill filed by the surety against the real estate of the principal, (now deceased,) within three years from the payment of the judgments, prevents the running of the Statute of Limitations, though the party making the advance did not become a party to the bill for more than six years thereafter.

(a) Cited in *McDowell vs. Goldsmith*, 24 Md. 281; S. C. 2 Md. Ch. 389; *Ohio Trust Co. vs. Winn*, 4 Md. Ch. 261.

(b) Approved in *Bullock vs. Campbell*, 9 Gill, 188; *Dorsey vs. Dashiell*, 1 Md. 208; *Thruston vs. Blackiston*, 36 Md. 510. The Statute of Limitations does not begin to run, in the case of principal and surety, until the time when payment is made by the latter. *Bullock vs. Bergman*, *supra*.

The right of set-off is reciprocal, and mutual claims, and such as are in the same right, can alone be set-off. (c)

A security who pays the debt of his principal at par in depreciated bank notes, can only recover the amount given for them, and in the absence of such proof, the payment will be estimated at the current market price at the time of the payment.

Securities in a bond who pay off the debt, may recover separately the sums respectively paid by them, and the evidence which one of them may have to rebut the plea of limitations, does not necessarily enure to the benefit of the other surety.

APPEAL from Chancery. A bill was filed on the 16th February, 1819, by Samuel C. Hall and Robert Evans on behalf of themselves and such other creditors of John Creswell the elder, as might come in, against his executor, heirs and devisees, to subject his real estate for sale, on the ground of the insufficiency of his personal estate to pay his debts. Hall claimed a debt due him arising from his endorsement of notes for Creswell's accommodation; and Evans as his security on a sheriff's bond entered into by Creswell. Various answers were filed, disclaiming knowledge of the complainant's

38 claims, when on the 9th June, 1823, * David Reynolds, as executor of William Byson, filed a claim dated 5th October, 1811, signed by John Creswell, admitting a balance due W. Byson of \$62.38.

The complainant Hall, on the 9th June, 1823, filed certified copies of the docket entries of two *fi. fa's* issued at September Term, 1818, in the case of the President and Directors of the Elkton Bank of Maryland, endorsees of John Creswell, against Samuel C. Hall, for \$4,000 and \$2,760, with interest, "returned levied, and satisfied plaintiff." Judgment had been recovered as above for \$4,000 and \$2,760, on the 9th September, 1816, with interest until paid, the records of which were also filed.

The death of the original complainants being suggested by petition, their administrators were made parties by bill of revivor.

On the 10th March, 1825, Philip Thomas filed his petition and claim. At April Term, 1820, the President and Directors of the Elkton Bank sued out their *fieri facias* against him, and sold his property for \$464.25. A short copy of the judgment obtained against him at September Term, 1816, was also filed by consent, and also the bond of indemnity of John Creswell the elder to Philip Thomas, dated 15th February, 1813, agreeing to indemnify him for any responsibility, or any debts or sums of money which he may be liable to pay on account of his being security for William Baxter, late cashier of

(c) Affirmed in *Scott vs. Scott*, 17 Md. 91; *Penniman vs. Loney*, 40 Md. 475; *Tyrrell vs. Tyrrell*, 54 Md. 169; *Mitchell vs. Mitchell*, 3 Md. Ch. 71; *Gibbs vs. Cunningham*, 4 Md. Ch. 325. See also, *Milburn vs. Guyther*, 8 Gill, 92; *Smith vs. Gas Co.* 81 Md. 17.

the Elkton Bank of Maryland. Philip Thomas also filed his account against John Creswell, deceased, for \$464.25, with interest from 1st April, 1820, until paid, and also the bond of William Baxter, with John Creswell and Philip Thomas as his sureties, to the bank aforesaid, dated 20th April, 1811, conditioned for the faithful discharge of Baxter's duty as cashier, which were admitted by consent.

On the 6th May, 1829, an amended bill was filed by the representatives of S. C. Hall and Robert Evans, and also by Washington Hall and Philip Thomas, David Reynolds, executor of William Byson, and the administrator of Reuben Reynolds, against the original parties, for the same objects as those * claimed in the original bill.

This bill was answered and limitations relied on. A commission was issued and a great variety of proof taken. Upon the death of John Creswell the younger, his widow Rebecca E. Creswell was made a party. The administrators of Reuben Reynolds, who had been a co-security with Robert Evans, first advanced their claim in 1829, upon the filing of the amended bill. The claim of Robert Evans and the evidence to remove the bar of limitations, are both stated in the opinion of this Court, with so much of the proof as relate to the questions decided. **39**

On the 5th May, 1840, the Chancellor [BLAND.] dismissed the bill, being of opinion that from the pleadings, petitions, exhibits and proofs in the cause, that all the claims against the real estate of John Creswell the elder, deceased, are barred by the Statute of Limitations.

From this decree the complainants appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, and CHAMBERS, JJ.

O. Scott and A. C. Magruder, for the appellants.

J. Johnson and Albert Constable, for the appellees.

BUCHANAN, C. J., delivered the opinion of this Court. The original bill was filed by Samuel C. Hall and Robert Evans on the 16th of February, 1819, in behalf of themselves * and other creditors who might become parties, to subject the real estate of **47** which John Creswell the elder died seized to sale, for the payment of their respective claims against his estate, the personal property being insufficient.

It has been urged in argument by the counsel for the appellees, that at the time of filing the bill the claims of the appellants were barred by the Act of Limitations, which is pleaded and set up in the answers; and on that ground the bill was dismissed by the Chancellor. It has therefore, on this appeal, become necessary to examine that, among other questions presented by the record.

Evans had been surety for Creswell in a bond executed by him as the sheriff of Cecil County, dated the 9th of October, 1810. On that bond suits were brought against him and Reuben Reynolds, a

co-security, and judgments rendered, which were discharged by them, one on the 8th August, 1815, by Evans, and the other by Reynolds and Evans on the 5th April, 1816. The amount of the payments by Evans of his proportion, being one-half of the whole amount paid, constitutes his claim, which, as the bill was filed on the 16th of February, 1819, more than three years after the payments, except what was paid on the 5th of April, 1816, would have been barred by the Act of Limitations. But it appears from the proof in the cause, that John Creswell, the younger, the son and devisee of Creswell, the principal in the bond, acknowledged the existence of the claim of Evans after he had attained the age of twenty-one, saying it was one that he would have to pay, and intended to pay; which acknowledgment took the case out of the Statute of Limitations.

Philip Thomas, another of the creditors, was, together with Creswell, the elder, a surety for Baxter in a bond given by him to the president and directors of the Elkton Bank, on the 20th of April, 1811, as the cashier of that institution; and took from Creswell, on the 15th of February, 1813, a bond of indemnity. The president and directors of the Elkton Bank instituted a suit against him, and obtained a judgment on the 11th of September, 1816, upon which a
48 *fi. fa.* was sued out, * and his property sold to satisfy the judgment, on the 1st of April, 1820. On the 10th of March, 1825, he exhibited his claim, and filed a petition to be let in as a creditor under the bill then depending; and as his claim commenced on the 1st of April, 1820, and was only exhibited on the 10th of March, 1825, more than three years afterwards, it would, by the established rule and practice in the Chancery Court of this State, adopted by this Court, "that the Statute of Limitations runs against a claim or debt up to the time it is exhibited," have been barred, but for the bond of indemnity executed to him by Creswell, which saves it. By that Act it is provided, that no bond, &c., shall be good and pleadable. &c., after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing. Here the debt or claim, the thing in action, had been standing only from the 1st of April, 1820, when Thomas, as surety for Baxter, was made to pay the money, until the 10th of March, 1825, when the claim was exhibited—less than five years. Before he had been made to pay the money, he had no right of action, no claim for which he could have sued upon the bond of indemnity. It was by his having been made to pay as surety for Baxter, that he was damnified. It was then that the "debt or thing in action" first arose, against which the Act of Limitations only began to run from that time, and from that time he had twelve years allowed him for bringing suit on the bond of indemnity.

It appears that on the 10th of March, 1814. two notes, negotiable at the Elkton Bank and payable sixty days after date, were drawn

by John Reynolds and endorsed by Samuel C. Hall and John Creswell. Those notes, it is in proof were discounted for the benefit and accommodation of Creswell, the second endorser, who received the proceeds and paid the discounts, and that Hall, the first endorser, was only his security. On these notes suits were brought in the Court of Cecil County, by the president and directors of the Elkton Bank, on the 8th of August, 1815, against Hall, and judgments rendered on the 2d of September, 1816. Judgments were also rendered in * suits upon the same notes against Joseph Cowden, executor of Creswell, one at the September Term, 1816, and the 49 other at the September Term, 1818. Two writs of *fi. fa.* were sued out on the judgments against Samuel C. Hall, who was thus coerced to discharge the amounts then due, on the 20th or 21st of August, 1818, with the aid, as it appears to us, of Washington Hall. The judgments were on the 20th of August, 1818, assigned by the president and directors of the Elkton Bank, to Samuel C. Hall, in consideration, as stated in the assignments, of the payments being made by him, and afterwards by him to Washington Hall, in consideration of the same amount with a covenant in the assignment, that as a further security, a mortgage before made to Washington Hall, should stand charged with that amount, in addition to the sum recited in the mortgage. By which it sufficiently appears that the assignment to Washington Hall was made to him, not as a purchaser of the judgments, but as collateral security for the repayment of the amount advanced or lent by him, for the purpose of satisfying the judgments, whereby Samuel C. Hall became his debtor to that amount, otherwise the covenant for securing the repayment of it by tacking it to a pre-existing mortgage, would not have been made. For if, as has been urged by counsel, he was a mere purchaser of the judgments for the consideration stated in the assignment, which is just the amount paid in satisfaction of the judgments, he could not by such purchase of Samuel C. Hall, have become his creditor for that amount, entitled to security for the repayment of it.

The payment by Samuel C. Hall, with the aid of Washington Hall, on the 20th of August, 1818, was made, it is true, more than three years after the notes became due and payable. But in any view of the subject, the running of the Act of Limitations was arrested by suits against him on the 8th of August, 1815, and the judgments on the 2d of September, 1816; and the payment on the 20th of August, 1818, made under the coercion of the writs of *fi. fa.* issued upon the judgments, gave him a right to be reimbursed out of the real estate, the personal estate being insufficient, to which the Act of Limitations opposed no * bar; the original bill being filed on the 16th of February, 1819, less than one year 50 after the payment from which his claim as surety of Creswell and right to sue, arose.

But it has been contended, that at the time of instituting the proceedings in Chancery, neither he nor Washington Hall, who came in as a party under the amended bill, had any claim or right to the relief prayed, on the supposed ground, that as by an entry in one of the books of the bank, the payment appears to have been made, not by him, but by Washington Hall, which could vest in Samuel C. Hall no right or claim; and that the payment by Washington Hall, as a mere volunteer, and therefore without authority, could clothe him with no right to subject the real estate of which Creswell died seized, to sale, for the amount of the unauthorized payment so made by him. It is true, that from the evidence in the cause, such an entry does appear to have been made. But it is equally true, that in the assignment by the president and directors of the Elkton Bank to Samuel C. Hall, the payment is stated to have been made by him; and from the whole of the proof and character of the transaction as disclosed in the record, it is sufficiently clear, that whether the payment was made in part by the hands of Samuel C. or Washington Hall (which is not material,) it was made for and on account of Samuel C. Hall, with money lent or advanced by Washington Hall. Hence the recital in the assignment of the judgments by the president and directors of the Elkton Bank, where the whole of the transaction was known, and understood, that the money was paid by Samuel C. Hall, and known too, the covenant in the assignment by Samuel C. to Washington, that a pre-existing mortgage should, as a further security, stand charged with the amount paid.

If, indeed, Washington Hall did, as a mere volunteer, without any authority and on his own account, discharge the judgments, that would have given him no claim which could be enforced against the real estate of Creswell. But that does not appear to have been the case. It has also been urged, that supposing the payment have been

made by Samuel C. Hall, *and that he thereby acquired a
51 right to proceed in Chancery against the real estate of Creswell, he by his assignment of the judgments to Washington Hall, divested himself of that right and transferred it to Washington Hall, who could alone enforce it; and that he having only come in as a party claimant under the amended and supplemental bill, which was filed on the 6th of May, 1829, his right was barred by the Act of Limitations. But not so as it seems to us. Samuel C. Hall having paid the money, the legal right was in him, subject to the equitable interest of Washington Hall, in respect of which only, he was brought in by the amended and supplemental bill. The claim was in before, and in time to protect it against the running of the Act of Limitations, having been exhibited with the original bill, the object of which was to enforce the payment of it.

The claims exhibited by other creditors, and not already commented upon, are clearly barred by the Act of Limitations, not being filed in time. The claim of the defendant for the amount of

rent reserved in a lease from Creswell the elder to Samuel C. Hall and others, pleaded by way of set-off against his claim, cannot we think be allowed. The right of set-off is reciprocal, and mutual claims, and such as are in the same right, can alone be set off.

Here Creswell the elder devised the whole of his estate, after certain other dispositions in his will, to his wife Elizabeth, during the minority of his son John.

The whole of the rent claimed accrued (if at all,) during the minority of John Creswell the younger; the right to which was in Elizabeth Creswell, and if not paid, is in her representatives, she being dead. John Creswell, Junior, (the devisee of his father John Creswell the elder,) who is also dead, devised the whole of the real and personal estate derived from his father, to his wife Rebecca E. Creswell, one of the defendants, who claims to set off the rents so accruing to Elizabeth Creswell. If Elizabeth Creswell, before her death, or her executor or administrator since, had brought suits against Hall to recover the rents to which she was thus entitled, it is very clear that he could not have set off against that demand, his claim *growing out of his responsibility for John Creswell the elder, for which she was in no way answerable, and for which she **52** could not have sustained a suit against her or her representatives, nor would she in this proceeding have been permitted, had she lived, to avail herself of her award for rent accruing in a different right, and upon covenant by way of set-off against Hall's claim, and much less can Rebecca E. Creswell, who has no right to, or interest in the rent claimed to be due, for which Hall is responsible (if at all,) to the representatives of Elizabeth Creswell. The amount, however, due on the judgment obtained by Creswell the elder, against him as security of Lightner, should be deducted from his claim. And it appearing to us that the judgments by the President and Directors of the Elkton Bank against Samuel C. Hall, were discharged in the notes of that bank at their par value, when they were at a depreciation of twenty cents, at least, in the dollar; and that the amount given for them is all that can be properly claimed on account of the payment to the bank, that being all that was paid, and as a reimbursement only of the amount that Hall was compelled to pay as the security for Creswell, is all that can be rightfully insisted upon, we are of opinion that twenty cents in the dollar should be deducted from the nominal amount paid to the bank, that being the amount of the depreciation at the time of the paper in which it was paid, according to the evidence in the record most to be relied upon.

In this view of the case the claims of four of the creditors being established, and not barred by the Act of Limitations, the bill should not have been dismissed. *Decree reversed, and cause remanded.*

53 * FREDERICK and PHILIP THOMAS DAWSON *vs.* JOHN A. BROWN & CO. Garnishees of PATRICK RYAN and JOHN RYAN.—December, 1841.

By the Act of 1795, chap. 56, sec. 1, (Rev. Code, Art. 67, IV, sec. 4,) an attaching creditor, at the time of making the preliminary proof of his claim, in order to procure a warrant for an attachment, is required to produce "the bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument of writing, account or accounts by which the said debtor is so indebted." *Held*—

It was not intended that the creditor should be bound to produce before the Judge or justice, all the written evidence which may be in his possession, and which might be used before a jury to establish the debt, and entitle him to a condemnation of the property attached. (a)

In an action against an endorser, it would be sufficient to produce the note endorsed by him.

So in an action upon an agreement containing dependent covenants, the production of the agreement would suffice.

So for the recovery of an open account, or for matters and things properly chargeable in account, though the creditor has written orders for each item, he need not produce them, nor more than his account, to the justice. (b)

The Act does not require the production of the testimony *qua* testimony, but of the cause of action. The account, bill, bond, &c. on which a declaration would be framed, and by which the debtor is so indebted. (c)

The creditor in making his preliminary proof for the notes of his debtor, is bound to produce them; but where his claim arises upon the draft of his debtor on him, paid, the drafts are but testimony and need not be produced at that time.

Where the affidavit and account filed by the creditor warrant an attachment for a sum of money, but not for the whole amount claimed, it is irregular in the justice to award the attachment for a greater sum than is properly established under the Act of 1795; but it is not such an error, the case is not so entirely *coram non judice*, as to authorize the County Court, upon the appearance of the garnishee, to quash the attachment. (d)

(a) Approved in *Barr vs. Perry*, 8 Gill, 320; *Lee vs. Tinges*, 7 Md. 229; *Mears vs. Adreon*, 31 Md. 238.

(b) Approved in *Lee vs. Tinges*, 7 Md. 229. Cited in *Friedenrich vs. Moore*, 24 Md. 308.

(c) Approved in *Iron Co. vs. Coal Co.* 22 Md. 499; *White vs. Solomonsky*, 30 Md. 589. See also, *Mears vs. Adreon*, 31 Md. 238.

(d) Approved in *Boarman vs. Israel*, 1 Gill, 379; *Lee vs. Tinges*, 7 Md. 233; *White vs. Solomonsky*, 30 Md. 589; *Jean vs. Spurrier*, 35 Md. 116. Distinguished in *Hough vs. Kugler*, 36 Md. 195. The case in the text establishes the principle, that the plaintiff in attachment may recover a less sum than the amount sworn to by him before the justice. *Lee vs. Tinges*, *supra*.

APPEAL from Baltimore County Court. This was a proceeding in attachment commenced by the appellants, on the 17th April, 1837, viz :

"State of Maryland, Baltimore City, to wit:

Be it remembered, that on the seventeenth day of April, in the year one thousand eight hundred and thirty-seven, before me the subscriber, a justice of the peace of the State of * Mayland, in and for the said city, personally appeared Philip Thomas Dawson, a citizen of the State of Maryland, and made oath on the Holy Evangely of Almighty God, that Patrick Ryan and John Ryan, partners trading under the firm of John Ryan & Sons, are justly and *bona fide* indebted unto him the said Philip Thomas Dawson and Frederick Dawson, partners trading under the firm of William Dawson & Company, in the sum of eleven thousand two hundred eighteen dollars twenty-five cents, over and above all discounts, and at the same time the said Philip Thomas Dawson produced to me the account on, and by which the said Patrick Ryan and John Ryan are so indebted, which is hereto annexed; and the said Philip Thomas Dawson did also make oath that he is credibly informed and verily believes, that the said Patrick Ryan and John Ryan are not, nor is either of them a citizen of the State of Maryland, and that they do not reside therein.

SAMUEL PICKERING."

DE. Messrs. P. Ryan & Son, in account current, with interest account to 17th April, 1837, with William Dawson & Co.

1837.

January 14, To paid 1 per cent. additional commission for collecting Neff & Brother's note, due in Cincinnati, 27th December, 1836, for \$2,137.26.....	93	32	\$31 37
— 30, To paid your note due 27th instant.....\$508 20	77	6 55	510 41
Postage and interest.....83			
Expenses of protesting.....1 38			
February 6, To paid your draft favor E. D. Whitney & Co., date 4th inst.....	70	3 50	300 00
— 20, To paid your draft E. D. Whitney & Co., date 18th inst.....	56	2 80	300 00
— 28, To your note due 13th Feb. 1837, unpaid.....	63	10 33	983 61
March 3. To paid your draft at sight, date 1st inst.....	45	5 25	700 00
— 6, To paid your two drafts at sight, date 3rd inst.....\$300 00	42	7 70	1,100 00
4th inst.....800 00			
* — 20, To paid your draft at sight, date 18th inst. favor E. P. Whitney & Co.....	28	2 33	500 00
			55

— 24, To paid your draft at sight, date 22nd inst.....	24	2 80	\$700 00
— 31, To do. do. " 29th "	17	1 98	700 00
— 31, To paid your note due 14th inst., unpaid	34	4 61	813 08
— 31, do. do. do. 10th do.....	38	3 72	587 52
— " do. do. do. 23rd do.....	25	2 45	588 85
— " To $\frac{3}{4}$ per ct. additional commission for collecting N. Sampson's note, due in Cincinnati, 12th inst. for \$1,069.83.....			8 02
— 31, To paid $\frac{3}{4}$ per ct. do. do. collecting Neff & Brother's note due in Cincinnati, 27th instant, \$2,137.25.....	17	07	16 03
April 5, To paid your draft favor E. D. Whitney & Co., at sight.....	12	1 00	500 00
— 7, To paid your draft, date, April 5th, at sight, to your order.....	10	67	400 00
— 5, To your note due this day, unpaid.....	12	1 10	549 59
— 5, do. do. do. do.	12	1 10	549 06
— 14, To paid R. B. Hancorek's draft at sight, favor E. D. Whitney & Co., date 12th inst..	3	26	530 00
— 14, To paid expenses protesting your note, due 5th April, 1837.....			2 13
— 15, To your note due this day, unpaid.....	2	30	910 62
— 17, To postages.....			2 50
— " To balance of interest to date of account.			56 14
			<u>\$11,919 63</u>

Cr.

1837.

March 8, By your acceptance, due 19th March, 1837	29	3 39	701 38
April 17, By balance carried down, due 17th April, 1837.....			11,218 25
			<u>\$11,919 63</u>
April 17, To balance due this day.....			<u>\$11,218 25</u>

Baltimore, 17th April, 1837.

E. & O. E.

56* " *To the clerk of Baltimore County Court:*

Mr. Kell,—You are hereby required, on receipt of this warrant, and the above oath and annexed vouchers on which the same is granted, to issue an attachment against the lands, tenements, goods, chattels and credits of the said Patrick Ryan and John Ryan, to answer unto the said Frederick Dawson and Philip Thomas Dawson, the above mentioned sum of eleven thousand two hundred eighteen dollars twenty-five cents, current money, and cost of this attachment,

according to the Act of Assembly in such case made and provided, and this warrant shall be your sufficient authority therefor. Given under my hand and seal, this seventeenth day of April, in the year eighteen hundred and thirty-seven.

SAMUEL PICKERING, [Seal.]

A Justice of the Peace for the City of Baltimore."

And thereupon, by virtue of the said warrant, and in pursuance of the Act of Assembly aforesaid, the said Frederick Dawson and Philip Thomas Dawson, by John Glenn, Esquire, their attorney, prosecuted and sued forth out of the County Court here, the writ of the State of Maryland, of attachment, in form following, to wit:

"The State of Maryland to the Sheriff of Baltimore County, greeting:

"Whereas, Samuel Pickering, Esquire, one of the justices of the peace for Baltimore City, hath this day issued his warrant to the clerk of said county, directing him to issue attachment against the lands, tenements, goods, chattels and credits of Patrick Ryan and John Ryan, to answer unto Frederick Dawson and Philip Thomas Dawson, the sum of eleven thousand two hundred eighteen dollars twenty-five cents: We therefore command you, that you attach the lands, tenements, goods, chattels and credits of the said Patrick Ryan and John Ryan, to the value of eleven thousand two hundred eighteen dollars twenty-five cents, current money, and cost of this attachment, according to the form of the Act of Assembly in such cases made and provided. And we do further command you, that by good and lawful men of your bailiwick, you make *known 57 unto the person or persons in whose hands you shall make this attachment, that he, she or they be and appear before the Judges of Baltimore County Court, at the Court-house in the same county, on the first day in May next, to shew cause (if any he, she or they have,) why the lands, tenements, goods, chattels and credits by you attached by virtue of this writ, in his, her or their hands, shall not be condemned, and execution thereof had and made to and for the use of the said Frederick Dawson and Philip Thomas Dawson, as of the lands, tenements, goods, chattels and credits of the said Patrick Ryan and John Ryan, according to the Act of Assembly in such cases made and provided, if to him, her or them it shall seem meet, and how you shall execute this writ, make known to our said Judges, at the day and place aforesaid, and have you then and there this writ. Witness the honorable STEVENSON ARCHER, Chief Judge of our said Court, the second day of January, in the year eighteen hundred and thirty-seven.

"Issued the 17th day of April, 1837.

"THOMAS KELL, Clerk."

And the said Frederick Dawson and Philip Thomas Dawson, by their attorney aforesaid, at the time of suing forth the foregoing writ of attachment, prosecuted and sued forth out of the County

Court here, the writ of the State of Maryland, of *capias ad respondendum*, against the said Patrick and John Ryan; and also filed in said cause the following short note, to wit:

"Frederick Dawson and Philip Thomas Dawson against Patrick Ryan and John Ryan—Action of assumpsit in Baltimore County Court.—This suit is instituted to recover the sum of eleven thousand two hundred eighteen dollars twenty-five cents, due and owing from the defendants to the plaintiffs, for money lent and advanced by the plaintiffs to the defendants, and at their instance and request, and for money had and received by the defendants to and for the use of the plaintiffs.
J. GLENN, for Plaintiffs."

A copy of which said short note was made and sent with the writs
58 aforesaid, to the sheriff of the county aforesaid, *thereon endorsed, "To be set up at the Court-house door;" and the sheriff returned the same.

Laid in the hands of George Brown, one of the firm of John A. Brown & Co., and laid in the hands of John A. Brown & Co. the 17th of April, 1837, in presence of Robert Wilson and Samuel Hiser. "Non sunt P. and J. R. copy set up, John W. Walker, sheriff."

The garnishees appeared and pleaded *non-assumpsit* and *nulla bona*, on which pleas issues were joined, and afterwards they moved the Court to quash the attachment for the following reasons:

1. Because the claim on which the attachment in this case was ordered, consisted of certain promissory notes of the absent defendants, and also of certain drafts drawn by said defendants; and the said notes and drafts do not appear to have been produced to the justice ordering the attachment, nor were they lodged with the clerk issuing it.

2. Because the claims on which the attachment in this case was ordered and issued, consisted in part, of certain promissory notes of the absent defendants, due to the plaintiffs in attachment, and the said notes were not produced to the justice ordering the attachment, nor were they lodged with the clerk issuing it.

3. Because the justice upon the claim as exhibited, had no authority to order, nor had the clerk authority to issue the attachment in this case.

The County Court quashed the attachment, and the plaintiffs below appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

Campbell and Richardson, for the appellants, and Brown and McMahon, for the appellees.

DORSEY, J. delivered the opinion of this Court. To sustain the judgment of the County Court, quashing the writ of attachment

issued in this case, a number of the *decisions of the Courts in Maryland have been referred to, in all of which it is apparent, that the requisitions of the Act of Assembly in relation to attachments had not been complied with, and that the Judge or Justice before whom the proceedings were had, possessed no power to order any writ of attachment to issue thereon. And such, it is alleged, was the condition of the Justice who directed the issuing of the writ before us. The objection taken to the proceedings before the Justice, is the omission of the appellants to exhibit before him the notes and drafts referred to in their account. Whether this objection be well founded or not, depends upon the true construction of that part of the first section of the Act of 1795, chap. 56, which requires the creditor, at the time of making his affidavit as therein directed, to produce "the bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument or instruments of writing, account or accounts, by which the said debtor is so indebted." We do not give to this requisition of the Act of Assembly that interpretation which the argument of the appellees would impose on it, to wit, that the creditor is bound to produce before the Judge or Justice, all the written evidence which may be in his possession, and which might be used before a jury to establish the debt, and entitle him to a condemnation of the property attached; as for example, if the attachment, applied for, were against the endorser of a promissory note, and the creditor, the endorsee, were possessed of the written acknowledgment of the endorser, that the endorsement was in his hand-writing, that the demand for payment had been duly made, and he notified of non-payment within the time prescribed by law, it would not be necessary to produce such acknowledgment before the Judge or Justice awarding the attachment; the production of the endorsed promissory note would be all that would be required; and if in the case of an agreement containing dependent covenants; as if A covenants to pay B a sum of money upon B's delivering to A, of certain specified articles, and B delivers the articles to A and takes his receipt therefor, upon an attachment against A, the receipt need not be *produced; the exhibition of the agreement itself being a sufficient compliance with the requisition of the Act of Assembly. So if an attachment be required on an open account, for goods sold and delivered, money had and received, paid, laid out and expended, or money lent and advanced, and the creditor had the debtor's written orders for every item charged in the account, their production before the Judge or magistrate is uncalled for by the Act of Assembly. It requires not the production of the testimony, *qua* testimony, by which the creditor's claim is to be established, but the production of his cause of action, the account, bill, bond, note or instrument of writing, on which a declaration would be framed, as his cause of action, being in the language of the Act of Assembly, "that by which the said

debtor is so indebted.” Apply this doctrine to the case before us, and it deprives the magistrate of all power to have issued his warrant for an attachment for that part of the account which relates to the notes not produced before him; not so, however, as to the drafts. They form not the creditor’s cause of action, and could not be declared on as such. They are but testimony, by which, in connexion with other proofs, certain items in the account may be established. For all that part of the account, therefore, not founded on the notes, the proof is sufficient to have warranted the justice in awarding an attachment. Does the issuing of an attachment for a larger sum than the creditor his cause of action has shown to be due, nullify the whole proceeding? is the question we are called on to decide. The authorities referred to have no bearing upon this question. In all of them it was manifest, that by reason of a non-compliance with the requisitions of the Act of Assembly, the Judge or Justice had no authority for issuing an attachment for any amount, and therefore the writs of attachment were quashed, as being *coram non judice*. In the case at bar, we think the magistrate had power to have ordered an attachment; there is error for all that portion of the appellant’s claim, dependent on the notes referred to in his account. There is error then in nothing but in the amount for which it issued.

61 By quashing the writ in such a case, * much greater injustice would be inflicted on the creditor, than sustaining the writ would visit upon the debtor. The process is issued but to compel the debtor to appear to the suit instituted against him; and if injured or oppressed by an excessive seizure and detention of his property, his means of relief are immediate, and entirely within his own control. There is no danger therefore of any serious evil resulting from sustaining the writ of attachment in such a case. With as much justice and propriety might it be urged, that if on a trial with the garnishee, the plaintiff fails to recover the entire amount by him sworn to before the justice, he shall recover nothing, and the writ of attachment shall be quashed; or that if a bail piece be taken on the plaintiff’s oath, as to the amount of his debt, for a larger amount than shall be recovered on the trial, that an *exoneretur* shall be entered thereon. We are aware of no principle or analogy of the law, which requires the quashing of the writ of attachment issued in this case for the cause assigned. *Judgment reversed, and procedendo awarded.*

BUCHANAN, C. J., and SPENCE, J. dissented.

BUCHANAN, C. J., delivered the following opinion :

I concur in the opinion of a majority of the Court, delivered by my brother DOESEY, that where a creditor who has a claim against an absent or absconding debtor, due on bond or note, or other instrument of writing, which he seeks to enforce by the process of attachment, he must at the time of making his application for the attach-

ment, produce before the justice, &c., to whom the application is made, the bond or note or other instrument of writing by which the debtor is indebted, and that the production of an account merely, charging such bond or note, &c., is not sufficient. I agree too, that where the claim arises upon an account, the production of such account, as that by which the alleged absconding debtor is indebted, is sufficient, without any voucher or proof to warrant an attachment for the amount charged and sworn to, the other requisites of * the law being complied with. But I cannot yield my assent **62** to so much of his opinion as sustains this attachment. The power given by the Act of 1795, chap. 56, to a justice of the peace, &c., to award attachments, is a specially delegated authority, which this Court has decided in *Shivers and Wilson*, 5 H. & J.; *Barney and Patterson*, 7 H. & J., and some subsequent cases, must be strictly pursued. That Act requires that a creditor who is desirous of suing out the process of attachment against an absent or absconding debtor shall make oath before a justice of the peace, &c., that such debtor is *bona fide* indebted to him or her, in a sum to be stated in the oath, over and above all discounts, and at the same time produce the "bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument or instruments of writing, account or accounts by which the debtor is so indebted," upon his doing which, that is making the oath, and producing the bond or bonds, &c., account or accounts by which the debtor is so indebted, the justice, &c., is authorized to issue his warrant to clerk to issue an attachment, but not otherwise.

Now, what is meant by the words "by which the debtor is so indebted?" Why they refer the words "by which" to the bond or bonds, &c., account or accounts; and the words "is so indebted," to the oath, and mean (as it seems to me,) indebted to the amount as stated and sworn to. "By which said debtor is so indebted, can I think, only mean by which he is indebted to the amount stated in the oath, and if that be so, (of which I cannot doubt,) as it is only upon the making the oath, to the amount claimed to be due (which amount is required to be set out in the oath,) and at the same time producing the bond, &c., account or accounts by which the absent or absconding debtor is so indebted, that the justice, &c., is authorized to award an attachment. It would seem to follow, not by reasoning from analogy, (which is not always the safest way of coming at a correct conclusion, and need not be resorted to in this case,) but from the language and meaning of the law itself, that the justice, &c., whose power in that respect * is special and limited and must be strictly pursued, can have no authority to direct an attachment to be issued unless those prerequisites are complied with; that is, unless in addition to the oath, stating the indebtedness and at the same time producing the bond or bonds, &c., account or accounts, or both, as the case may be, by which the debtor is indebted in the **63**

sum sworn to, and for which the attachment is sought to be obtained; and that done, the warrant for the attachment goes to the clerk for the sum stated in the oath to be due. He cannot award an attachment without a previous oath, stating the sum in which the debtor is indebted. Now, if such oath be made, unless the vouchers by which he is so indebted shall at the same time be produced, the oath without the vouchers can give no authority; nor the vouchers without the oath. Neither can be dispensed with. The two must unite. In this case the plaintiff made oath before a justice of the peace, that the debtor was indebted to him in the sum of \$11,218.25, and produced an account for that amount, made up, among other things, of charges to a large amount for notes due and unpaid. The production of that account, as far as concerns the other items, charged, was sufficient, being that by which the alleged debtor was indebted for so much of the sum sworn to. But not covering the whole amount, and the Act requiring the bond or bonds, note or notes, &c., account or accounts by which the debtor is indebted, in the sum mentioned in the oath, to be produced; and the notes charged in the account, by which he is indebted to a large amount of the sum sworn to, not having been produced, that requirement of the Act was not complied with as far as respects the notes charged, and without the production of the notes, by which he in part was so indebted, the justice of the peace, I think, was not justified in awarding an attachment for the whole amount of the sum sworn to, in a part of which only the debtor is indebted by the account produced. His authority only being to direct the issuing an attachment in the sum mentioned in the oath of a creditor, in the production of the voucher or vouchers, as the case may be, by which the debtor is so indebted; and there is no hardship * in that, as it would be as easy to produce the vouchers themselves as an account charging them.

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There was no authority for awarding an attachment for so much of the sum stated in the oath as was charged in the account to be due on notes that were not produced; and the attachment being for the whole sum, for a part of which the justice was not authorized to award it, it was improvidently issued; and being an entire thing, illegally directed and issued, and not warranted by the Act of Assembly, it cannot in my opinion be split up, and sustained in relation to any part of the amount for which it was issued, and the Court below, I think, did right in adjudging it to be quashed.

The inquiry is, was it properly issuable; was it authorized by the Act of Assembly, and if not, can it now be awarded or deemed good for any purpose? I think not, stamped as it is with the want of authority in the justice to issue it.

NOTE BY REPORTERS. Since the case of *Baldwin vs. Neal and Ridgeway*, 10 G. & J. 274, originated, the Act of 1834, chap. 79, was passed; the first section of that Act dispenses with the averment, for the want of which that

cause was decided: and which averment is not contained in the affidavit in this case, it being no longer necessary to do more than prove residence in the United States, &c. of some one of the plaintiffs at the trial, where such averment is not made in the affidavit to procure the attachment. The 3rd sec. of the Act of 1834, ch. 79, is however repealed by the Act of 1842, chap. 107.

THOMAS A. BURGESS *vs.* THE STATE OF MARYLAND, use of G.
G. S. SKINNER.—December, 1841.

In an action brought upon an administration bond, for the use of S. who claimed as the assignee of the obligee of the intestate, it is necessary to prove the assignment of the bond to the equitable plaintiff, but an objection to the admissibility of the bond in evidence, does not raise any question about its assignment: for the bond may be proved as a part of the chain of evidence without proof of the assignment, and if no such proof was eventually offered, the proper objection would be to the plaintiff's right to recover.

Since the Act of 1825, chap. 117, upon an exception, this Court can only look to the point decided.

* APPEAL from Charles County Court. This was an action of debt, commenced on the 22d February, 1837, by the appellee against the appellant, upon the bond of James T. Henderson, as administrator of John Henderson, conditioned well and truly to perform the office of such administrator, and was executed on the 14th August, 1832. The defendant pleaded general performance. 65

The plaintiff replied that the said John Henderson, deceased, in the writing obligatory aforesaid mentioned, in his life-time, on the 25th day of June, 1831, by his certain writing obligatory, acknowledged himself to be held and firmly bound unto John L. Henderson in the full and just sum of \$141.81½, current money of the United States, to be paid to him when afterwards he should be thereunto required, and which said writing obligatory was made and passed for a just and *bona fide* debt then due and owing him from the said John Henderson to the said John L. Henderson, and yet unpaid or in any manner satisfied, and which said writing was for value received in due form of law, was afterwards, to wit, on the day of, &c., by the said John L. Henderson, assigned to George G. Skinner, for whose use this suit was instituted; and the said State by its attorney further saith, that after the death of the said John Henderson, and after the making of the writing obligatory aforesaid, and after the assignment of the same as aforesaid, he the said George G. Skinner sued forth the State's writ of *capias ad respondendum* out of Charles County Court, on the 27th day of February, 1836, against James Henderson, administrator of the said John Henderson, deceased, to recover the money due and owing to him the said George, in manner aforesaid,

by the said John Henderson, deceased, and which said writ was directed to the sheriff of Charles County, in which said county, the said James Henderson lived, whereby he was commanded to take into his custody the body of the said James, administrator of the said John, late of said county, deceased, otherwise, &c., if he should be found in his bailiwick, and him should safe keep, so that he might have his body before the said Court, &c., on the third Monday of

66 March then next, to answer unto the said * George, in a plea that he render unto him the said sum of \$141.81; which from him the said James unjustly detained, &c., and he should have then and there that writ. On which third Monday, &c., being the day of the return of the said writ, the said sheriff, to wit, John B. Lawson, Esquire, the sheriff of the county in which he the said James lived, to whom the said writ was directed, made return thereof to the said Court, that the said James was not to be found in his bailiwick, as by the said writ and return thereof, now of record in the said Court remaining appears, and so the said State by W. Mitchell its said attorney saith, that the said James did not well and truly perform the office of administrator of the said John Henderson, late of Charles County, deceased, according to law, and did not, &c. Wherefore, &c.

The defendant rejoined, that the said James T. Henderson in the condition of the said writing obligatory mentioned, from the time of making the said writing obligatory, hath well and truly observed, performed, fulfilled and kept, all and singular the matters and things to be done and performed, according to the condition of the said writing obligatory aforesaid mentioned, and of this he the said Thomas A. Burgess puts himself upon the country.

The said State of Maryland, in like, &c.

The jury rendered a verdict for the plaintiff.

At the trial the plaintiff to support the action gave in evidence to the jury the single bill mentioned in said replication, as follows, to wit:

\$141.81 $\frac{1}{2}$. On demand, for value received, I hereby oblige myself, my heirs, executors and administrators, to pay or cause to be paid unto John Lewis Henderson, his heirs or assigns, the just and full sum of one hundred and forty-one dollars and eighty-one and one-fourth cents, lawful money of the United States, with legal interest from the date hereof, until paid, as witness my hand and seal, this 25th day of June, eighteen hundred and thirty-one.

Witness,—Jon. F. Dunnington. JOHN HENDERSON, [Seal.]

67 * At the foot of the above bill obligatory is thus written: "I assign all my right and interest in the above note to George G. Skinner."

On the back of the above writing obligatory is thus written, to wit:

Charles County, to wit: On the 7th day of November, 1832, personally appears John Lewis Henderson, before the subscriber, a justice of the peace in and for said county, and makes oath on the Holy Evangely of Almighty God, that the within note is justly due him; that he hath not either directly or indirectly, neither has any person for him or his use, before or since the death of John Henderson, the signer of the same, received any part, parcel, security or satisfaction for the same, to the best of his knowledge and belief.

Sworn before

JNO. F. DUNNINGTON.

Passed by the Court.

Test,—WM. D. MERRICK,

Nov. 20th, 1832.

Register of Wills for Charles Co.

The defendant objected to the said single bill being read in evidence in this case, unless the assignment from John L. Henderson, the obligee in the bond, to George G. Skinner, for whose use and benefit this suit was instituted, was first proved; because the original writ in this cause was ordered for the use of George G. Skinner, and it was not competent for the party instituting the action in the bond to shew a cause of action due to a third person, but the Court [STEPHEN, C. J., KEY, A. J.] overruled the objection, and permitted said note to be read in evidence to the jury; to which opinion of the Court under the pleadings in the cause, the defendant excepted, and prosecuted this appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Crain, for the appellant.

No counsel appeared for the appellee.

ARCHER, J. delivered the opinion of this Court. *The pleadings in this cause put nothing in issue but the performance or non-performance of, by the administrator, of his duty as such; no issue whatever has been taken in relation to any one fact averred in the replication. The rejoinder is but the reiteration of the plea of performance, and is nothing more than the answer to the conclusion, which the plaintiff has drawn from the facts set out as a breach in the replication, so that the parties have gone to trial without the breach set out in the replication being in any manner answered or rejoined to. 68

We should have had but little difficulty in disposing of this case, but for the Act of 1825, chap. 117; since that statute we can only look to the point decided.

The bill of exceptions, if strictly construed, would present the question, that the assignment must be first proved before the obligation assigned could be given in evidence; but the reason assigned shows that the point intended to be raised, was the question as to the admissibility of the obligation in evidence, without also having the proof of the assignment.

The action is entered for the use of G. S. Skinner, who in the replication is averred to be the assignee, and for whose use it is averred the suit was instituted. He could not certainly recover without showing himself entitled to the cause of action, by proof of the alleged assignment. But no question is raised on the right to recover without proof of the assignment; but simply whether the obligation is evidence without proof of the assignment. The breach alleges the existence of the obligation, the assignment, and the return of *non est* on the *capias*, against the administrator. These allegations furnish the foundation of the plaintiff's right of action, and each should, when put in issue, be established; each allegation may be separately proved, and if the plaintiff prove one without the others, no objection can be taken to the admissibility of the proof offered, for by offering it, he is but proving the allegation of the breach. The objection as we have before said, would lie not to the testimony, but to the right to recover, if the plaintiff stops with this proof, and offers no evidence of the assignment.

Judgment affirmed.

69 * SOMERVILLE PINKNEY, Administrator of THOMAS H. LUCKETT vs. JAY, MASON and others.—December, 1841.

The language of the Act of 1795, chap. 88, discriminates between a proceeding before, and after, a decree, against a non-resident defendant.

Before the decree has passed, the language authorizing the action of the Court is broad and comprehensive. It is, there shall in all respects be the same proceedings before a decree, as if the defendant had appeared regularly on the return of a subpoena.

After the decree has passed, the language is more restricted, and clearly warrant nothing more than a review of the decree itself, according to the established principles of equity, and as if the party had appeared.

A bill of review is the appropriate remedy to correct or alter a decree either for error apparent, or by reason of the discovery of new and relevant matter after the decree has passed. An original bill is never proper to be resorted to, except where the decree is to be impeached on the ground of fraud. (a)

After a decree has been affirmed upon appeal, no bill of review would properly lie for error apparent on the face of the decree. The exercise of such a jurisdiction by the Court of Chancery would be subversive of that subordination which has been established by the Constitution of the State.

A bill of review which would lie in such a case, must be founded upon new matter discovered since the decree, and in that sense the opinion of the Court in 10 G. & J. 497, is to be understood.

(a) Cited in *Marbury vs. Stonestreet*, 1 Md. 155; *Waring vs. Turton*, 44 Md. 547. See *Hollingsworth vs. McDonald*, 2 H. & J. 199, note; *Oliver vs. Palmer*, 11 G. & J. 94.

Upon a bill sworn to before a Justice of the Peace in the District of Columbia, who was certified to be such Justice by the Secretary of State for the United States, under his seal of office, the Chancellor granted an injunction.

APPEAL from the Court of Chancy. This cause has been before the Court at December, 1839, and is reported in 10 G. & J. 480, as the case of *Lockett against White et al.*

On the 29th June, 1840, the Chancellor, [BLAND,] upon the opinion of this Court, 10 G. & J. 497, passed the following order :

On consideration of the foregoing petition and of the opinion of the Judges of the Court of Appeal therewith exhibited, it is ordered in pursuance of the said opinion, that the said petitioners have leave to file their said bill of complaint, and that an injunction issue as thereby prayed upon, an injunction * bond, in the penalty of two thousand dollars, with surety, to be approved by the Chancellor, being filed with the register, as prayed by the said petition. **70**

And thereupon the said petitioners filed in the said cause their bill of review in the words following, to wit :

The bill of review of Peter Augustus Jay and Betsy C. Mason, and of Betty Mason, Matilda Eulalia Mason, Ann Grahame Mason, Thomas F. Mason, John Francis Mason, Virginia Mason, Caroline Morris Mason, Arthur Pendleton Mason and Clapham Mason, who are infants under the age of twenty-one years, by the said Betsy C. Mason, their mother and next friend, humbly shows : That heretofore, to wit, on the twenty-seventh day of June, in the year 1825, a certain Thomas H. Lockett filed his bill of complaint in this Court against a certain Otho H. W. Lockett, Valentine P. Lockett, Samuel Clapham and Daniel Trundle, wherein it is amongst other things alleged, that one Thomas H. Lockett who is therein represented to have been the father of the complainant and of the defendants Otho and Valentine, being seized in his demesne as of fee of the several tracts or parcels of land lying in Montgomery County, in this State, that is to say of a tract called Conjurors' Disappointment, &c., &c., did on the 27th December, in the year 1786, duly make known and publish his last will and testament in writing, and did thereby devise the said tracts called Conjurors' Disappointment, &c., unto the said Valentine P. Lockett, and the said tract called the Resurvey on Discord, to the said Otho H. W. Lockett, upon the express condition that each of the said devisees should pay unto the said complainant, who it is averred is the younger brother mentioned in the will as not yet baptized, the sum of one hundred pounds, current money of the Commonwealth of Virginia, and that by said will the said devises were made subject to one other devise in said will contained, whereby the said lands and all other real estate of the testator were devised to the testator's wife Elizabeth Lockett, during her sole and unmarried life, and that the said Elizabeth, who it is also charged was the com-

71 plaintiff's mother, * survived her aforesaid husband, and continued to live a sole and unmarried life until the time of her death, which took place about the year 1817, and that in the year 1805, the said Elizabeth executed to her sons the said Valentine and Otho, separate deeds of release and acquittance, by which she relinquished to them her right and title to said tracts or parcels of land so as aforesaid devised to them by their said father. And that the considerations mentioned in said deeds as having been paid by the said Valentine and Otho were merely nominal, and that in fact nothing was paid by them to their said mother on account thereof; but that said deeds were executed for the purpose of enabling them to sell their said lands to the defendant Clapham, in execution of an agreement before that time made, and in consummation of which, deeds were accordingly executed on the same day, and that the said Clapham at the time of said purchases, had notice of the claims of the complainants on said lands, and that afterwards payment thereof was demanded by the said complainants of the said Clapham, and that sundry negotiations took place between them in relation thereto, as is more fully stated in said bill; and that afterwards the said Clapham sold and conveyed said lands unto the defendant Trundle, who had at the time notice of the said claims of the complainant, and by said bill the said complainant prayed a decree for the sale of said lands, or so much thereof as may be necessary to pay him said legacies with interest, and such other relief in the premises as he might be justly entitled to; and also that an order of publication might issue in the usual form against the said Otho, Valentine and Clapham, who it is therein alleged resided out of the State of Maryland, and that a subpœna might be issued against the said Trundle, and so forth. And your orators further shew, that an order of publication was passed in compliance with the prayer of said bill against the said absent defendants, Otho H. W. Lockett, Valentine P. Lockett and Samuel Clapham, and process of subpœna was issued against the said Daniel Trundle, and that such other proceedings were had. That afterwards the said Clapham and Trundle filed their * answers to

72 said bill of complaint; but before the other defendants, Otho H. W. Lockett and Valentine P. Lockett, had answered or appeared to said suit, that is to say, on the twenty-sixth day of February, in the year eighteen hundred and twenty-nine, the said complainant filed in the cause his bill of amendment, supplement and revivor, against the said Otho H. W. Lockett, Valentine P. Lockett, and also Elizabeth Clapham, James B. Murray and Eliza Thompson, and one Eliza Ratcliffe, who, as your orators believe, is a fictitious personage, and your orator, Peter Augustus Jay; and therein amongst other things it is charged that the said Samuel Clapham, named in the aforesaid original bill, had departed this life pending this suit, and that he left no heir nor any representative other than his widow, the aforesaid

Elizabeth Clapham, and that the said original bill did untruly state that the said Samuel Clapham had conveyed unto the said Trundle all the lands which he had acquired by conveyance from the said Otho and Valentine, and that in fact the said Samuel Clapham conveyed unto the said Trundle the tract or parcel of land called Resurvey upon Discord, and that on the seventeenth day of June, in the year 1824, the said Clapham conveyed unto the said James B. Murray the lands called Conjurors' Disappointment, Georgia, and Gleanings, in trust, to sell the same for payment of a certain debt due from said Clapham unto one James Thompson, as is therein more fully stated. And that afterwards the aforesaid lands were sold by the said James B. Murray unto the said Eliza Thompson, Peter Augustus Jay and Eliza Ratcliffe, executors of the said James Thompson, and conveyed unto them by deed dated on the ninth day of June, in the year 1828, and that the said Murray at the time of execution of said deed of trust, and the said Eliza Thompson, Peter Augustus Jay and Eliza Ratcliffe, at the date of the deed unto them from the said Murray, had notice of the claims of the said complainant as aforesaid. Whereupon the said complainant prayed relief by a decree for a sale of the aforesaid premises for payment of his said claims, unless the defendants or some of them should pay his aforesaid demands, * and for general relief, and so forth. And also for an order of publication in the usual form, against the said Otho H. W. Lockett, Valentine P. Lockett, Elizabeth Clapham, James B. Murray, Eliza Thompson, Peter Augustus Jay and Eliza Ratcliffe, who are therein alleged to reside out of the State of Maryland. And your orators further charge, that an order of publication was accordingly passed against said defendants, and that afterwards, by a decree passed in the cause on the ninth day of October, in the year 1829, it was adjudged, ordered and decreed that the aforesaid original bill of complaint be taken *pro confesso* against the defendants, Otho H. W. Lockett and Valentine P. Lockett, and that the aforesaid bill of amendment, supplement and revivor be taken *pro confesso* against said defendants, Otho H. W. Lockett and Valentine P. Lockett, and the defendants, Elizabeth Clapham, James B. Murray, Eliza Thompson, Peter Augustus Jay and Eliza Ratcliffe. And your orators further charge, that afterwards, on the eighth day of May, in the year eighteen hundred and thirty-two, the said complainant filed his bill of revivor in said cause against certain Benjamin Shrieve, Junior, and Mary Elizabeth, his wife, and Stephen White and Ann, his wife; and therein amongst other things it is suggested that the said Daniel Trundle had departed this life, leaving said Mary Elizabeth and Anu, his heirs-at-law, and it is thereby prayed that the said suit which had abated by the death of the said Trundle, might be revived against the said defendants in said bill of revivor named. And your orators further charge, that such other pro-

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ceedings were had in said cause, that afterwards, to wit, on the tenth day of October, in the year 1837, a decree was passed whereby the bill of complaint of the complainant was dismissed with costs, and so forth, as by the said decree and other the proceedings now remaining in this Court will more fully appear. And your orators further charge, that the said complainant appealed from said decree, to the Court of Appeals for the Western Shore, which was so proceeded in, that on the thirtieth day of January, in the year 1840, a

74 decree was passed by said Court, whereby the decree * of this Court, so far as it dismissed the complainant's bill of complaint against the said Valentine P. Lockett, Elizabeth Clapham, James B. Murray, Eliza Thompson, Peter Augustus Jay and Eliza Ratcliffe, is reversed with costs to the said complainant in the said Court of Appeals, and in this Court of Chancery; and it is thereby amongst other things further adjudged, ordered and decreed, that the said tracts called Conjurors' Disappointment, Georgia, and Gleanings, or so much thereof as may be necessary to pay the complainant the sum of three hundred and thirty-three dollars and thirty-three and a third cents, with interest thereon from the twelfth day of February, in the year seventeen hundred and eighty-eight, until paid, together with costs as aforesaid, be sold, unless the said defendants shall pay to the said complainant, or bring into the Court of Chancery, to be paid unto him, the aforesaid principal sum of money, with interest and costs, on or before the first day of July next, and a trustee is thereby appointed to make said sale, and the cause is remanded to this Court, with power to your honor to pass such order and decrees as may be necessary to carry the said decree into effect, as by a copy of said decree which is filed in this cause, will more fully appear. And your orators further charge, that all the interest and estate which the aforesaid bill supposes, were vested in your orators, Peter Augustus Jay and the said Eliza Ratcliffe; and the said Eliza Thompson had become beneficially transferred to and vested in your orators Betsy O. Mason, Betty Mason, Matilda Eulalia Mason, Ann Grahame Mason, Thompson F. Mason, John Francis Mason, Arthur Pendleton Mason and Clapham Mason, prior to the date of the decree last aforesaid, and that thereby the said last named complainants are and ought to be treated as representing your aforesaid orators, Jay and the said Ratcliffe, to the extent of said interest; and that nevertheless as your orators Jay and the said Ratcliffe are made personally responsible for costs as aforesaid, the said Jay is really and individually aggrieved by the aforesaid decree, and have a right to require a review thereof, as well for his own protection as in behalf of his * aforesaid co-complainants.

75 And your orators do further charge, that the said Jay and the said Ratcliffe, if she had any existence at the time of commencing said suit, were and thenceforth continually have been and now are residents of the State of New York, and are not, nor have been

during any portion of said time, residents of the State of Maryland; and that your orators, Betsy C. Mason and her aforesaid children, have not at any time during the pendency of said suit, resided, and do not at this time reside in the State of Maryland; and inasmuch as eighteen months have not elapsed since the date of the aforesaid decree, by which your orators are aggrieved, they are advised and do most respectfully insist and require a review of the aforesaid decree, and pray that your honor will proceed to an examination of the matters in dispute in said suit, and to a final decree therein, in the same manner as if your orators had originally appeared, and by their answer had insisted upon their defences to said suit. And your orators pray leave to rely on all the matters of objection to the claim of the said complainant which are disclosed by the aforesaid bill or bills of complaint of the said complainant; and more especially do they insist that the said bill or bills of complaint are inconsistent in this, that they blend together separate and distinct causes, or pretended causes of action, or suits, against these complainants, with other separate and distinct causes, or pretended causes of action, against other defendants to said suit. Whereas your orators are advised and insist, that the said complainant ought to have brought one suit against the said Otho H. W. Luckett, and the person or persons who claim the lands which were devised to him by the supposed last will and testament of his aforesaid father, Thomas H. Luckett, for recovery of the legacy or sum which is supposed to have been charged on said lands by the said last will and testament; and one other suit against the said Valentine P. Luckett. And your orators, or such other person or persons as were supposed by the said complainant to have or to claim an interest in the lands which were supposed to have been devised by the aforesaid pretended last will and testament of * his aforesaid father, Thomas H. Luckett, unto the said Valentine, for recovery of the legacy or sum 76 which is supposed to have been charged on said lands by the said supposed last will and testament, and they pray they may have the same benefit of this objection as if they had appeared originally to said suit, and by due form of pleading relied thereon. And your orators further say, that they have no personal knowledge of the execution of the aforesaid supposed last will and testament, and cannot admit nor deny its execution; but they are advised and so insist that the proofs which were adduced by the said complainant are not competent and sufficient to establish its making and publishing in due form of law, and they claim the benefit of such deficiencies, and leave the complainant to offer such further evidence in support of the averments in said bill in relation to the execution of said last will and testament as he may think proper; and if the said complainant should adduce any competent and sufficient evidence of the execution of the aforesaid last will and testament, and of the original existence of his demand as aforesaid, your orators will insist and do

now charge, that from the very great lapse of time since it is supposed the said claim originated, it ought to be presumed that the same hath been paid or satisfied. And your orators do pray leave to insist on the limitations of time as aforesaid, as a defence and bar in this Court against the claim of the complainant so as aforesaid pretended against the lands now claimed as aforesaid by these complainants. Your orators hereby denying all knowledge of the treaties or negotiations which are by the aforesaid original bill pretended to have taken place between the complainant and the said Samuel Clapham, in relation to his aforesaid pretended claims, or of the age of the complainant at the present or at any preceding period. And your orators also aver, that after they had acquired title to the aforesaid lands, as is stated in the said original bill of complaint, and in this bill, they heard that the said complainant pretended that he had a claim against the aforesaid lands, founded upon the devises supposed to be contained in the last will and testament of said

77 * Thomas H. Lockett; but at the same time they heard and understood that said claim had been paid or satisfied, and relinquished, released or abandoned, by the said complainant to the said Valentine P. Lockett. And your orators do therefore insist the said claim, if it ever really existed, which is by no means admitted, has been a long time ago paid or satisfied by the said Valentine P. Lockett, or some other person on his behalf, unto the said complainant, and that in consequence thereof, the same hath been released, relinquished or abandoned by him, and they pray to have the same benefit of the aforesaid defences and of the proofs which may be adduced in support thereof, as if they had originally appeared to the cause and relied on the same. And your orators further charge, that on or about the thirteenth day of August, in the year 1810, the said Valentine P. Lockett applied to Frederick County Court, as a Court of equity, for the benefit of the Act passed for the relief of sundry insolvent debtors and its supplements, and that he was finally discharged on said application, and that the said complainant assented to his discharge. Of this fact your orators obtained knowledge a long time after they acquired their interests in said lands as aforesaid, and your orators are advised and insist that the said release, with the assent of the said complainant, is not only evidence that the said complainant had abandoned his claims, if any he ever had against the aforesaid lands, and looked exclusively to the said Valentine for payment thereof; but that the same in equity will be construed to operate as a release in favor of your orators of any lien or charge which the said complainant ever had therein under color of his aforesaid pretended claim. And your orators are further informed and charge, that the complainant gave his consent to the discharge of the said Valentine at the instance and solicitation of the said Elizabeth Lockett, his mother, and upon her undertaking to pay him the amount of his claims against the said Valentine; that the

said Elizabeth was at that time a lady of considerable property, and that she left property at the time of her death in value more than adequate to the payment of the aforesaid pretended * claim, which upon her death, came into the hands of the said complainant as executor, administrator or otherwise, out of which he might have satisfied himself for his aforesaid demand, if in fact the same was not satisfied unto him by his said mother in her life-time, as your orators have reason to believe it was. And your orators further charge, that the said Samuel Clapham purchased the aforesaid lands of the said Valentine some time in or about the year eighteen hundred and five, for a full and valuable consideration at the time, paid by the said Clapham to the said Valentine, as by a copy of said conveyance filed in the cause as one of the exhibits of the said complainant will appear. And your orators are credibly informed and verily believe, that at the time of making such purchase and taking a conveyance therefor as aforesaid, the said Clapham had no notice whatsoever of the claim of the said complainant, now pretended against the aforesaid lands, and that immediately after the making of said conveyance, the said Clapham entered upon said lands and thenceforth continually held them until on about the seventeenth day of June, in the year 1824, when he sold and conveyed the same unto the said James B. Murray, for a full and valuable consideration, as by a copy of said conveyance filed by the complainant in the cause will appear; and that for the greater portion of the time between the said conveyances, he was ignorant of the aforesaid pretended claims of the complainant, and from the time he received notice thereof, he continually denied their existence and his obligation in law or equity to discharge them. And your orators further charge, that they are informed and believe, that at the time of taking the conveyance as aforesaid from the said Clapham, the said Murray had no notice whatsoever of the aforesaid pretended claims of the complainant, and that afterwards, to wit, on the twenty-fifth day of July, in the year 1828, the said Murray sold and conveyed the said lands unto Eliza Thompson, in said bill named, one Peter W. Ratcliffe, and your orator Peter Augustus Jay, as joint tenants, for a full and valuable consideration by them paid to him, as by a copy of said conveyance filed by the said complainant in * the cause will appear; and that at the time of taking the said conveyance, the said Thompson, Ratcliffe and Jay, had no notice whatsoever of the aforesaid pretended claims of the complainants. And your orators Betsy C. Mason, Betty Mason, Matilda Eulalia Mason, Ann Grahame Mason, Thompson F. Mason, John Francis Mason, Virginia Mason, Caroline Morris Mason, Arthur Pendleton Mason, and Clapham Mason, charge that they have acquired beneficially all the interest and estate of the said Eliza Thompson, who is since deceased, Peter W. Ratcliffe and Peter Augustus Jay, in and to the aforesaid premises, and that at the time of acquiring such interest and estate therein, they had no notice

whatsoever of the aforesaid pretended claims of the complainant, although they admit said suit was depending at the time ; and they are advised and so insist, that they are entitled as assignees as aforesaid by mesne conveyances from the said Clapham, to rely on the want of notice of the aforesaid pretended claims, as well to the said Clapham and Murray as to the said Thompson, Ratcliffe and Jay. And your orators further charge, that the said James B. Murray acquired his title in the aforesaid lands prior to the filing of the original bill of the complainant, yet he was not made a party thereto. And that before the time of filing the aforesaid bill of amendment, supplement, and revivor, the said James B. Murray had conveyed the aforesaid premises unto the said Eliza Thompson, Peter W. Ratcliffe, and Peter Augustus Jay, yet that the said Peter W. Ratcliffe was not made a party to said bill, nor to any of the subsequent proceedings in the cause. And your orators are advised that the said Peter W. Ratcliffe was not barred by the aforesaid decree or other proceedings in said suit, and that consequently such interest and estate in the aforesaid premises as your orators Betsy C. Mason, Betty Mason, Matilda Eulalia Mason, Ann Grahaune Mason, Thompson F. Mason, John Francis Mason, Virginia Mason, Caroline Morris Mason, Arthur Pendleton Mason and Clapham Mason, acquired under the said Peter W. Ratcliffe, must remain unprejudiced by the said decree and other

80 the aforesaid proceedings, and that as representing * the said Ratcliffe, your orators last named were material and necessary parties to said suit. And your orators further charge, that the said complainant as well as the said Valentine P. Lockett, resided out of the State of Maryland. To the end, therefore, that the said Thomas H. Lockett and Valentine P. Lockett may answer the several matters and things hereinbefore stated, and that the decree aforesaid may be reviewed and opened, and that the cause may be examined and determined, as if your orators had originally appeared thereto, and that it may be declared that the said Thomas H. Lockett hath no claim whatsoever against the premises now held by your orators, and his aforesaid bill of complaint may be dismissed, and that your orators may have such other relief as their case may require, and in the meantime that execution of the aforesaid decree may be stayed and enjoined. May it please your honor to grant unto your orators an order of publication in the usual form, giving notice to the said Thomas H. Lockett and Valentine P. Lockett, of the substance and object of this suit, and warning them to appear in this Court to answer the premises and shew cause, if any they have, why a decree ought not to pass as prayed ; and that an injunction or order may be passed enjoining and restraining the said Thomas H. Lockett and the aforesaid trustee, Somerville Pinkney, from selling the aforesaid lands, or in any other manner proceeding to execute said decree without the further order of this Court ; and as in duty, &c.

THOMAS S. ALEXANDER, *for Compls.*

District of Columbia, Washington County, to wit: On this 19th day of June, in the year eighteen hundred and forty, before the subscriber, Th. H. Hampton, a justice of the peace for said county and district, personally appeared Betsy C. Mason, one of the complainants within named, and made oath that the matters stated in the foregoing bill are true, to the best of her knowledge and belief.

TH. R. HAMPTON, J. P.

United States of America, Department of State. To all to whom these presents shall come, greeting: I certify that *Thomas R. Hampton, whose name is subscribed to the paper hereunto annexed, is now, and was at the time of subscribing the same a justice of the peace for the County of Washington, in the District of Columbia, duly commissioned, and that full faith and confidence are due to his acts as such. In testimony whereof, I, John Forsyth, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed. Done at the City of Washington, this nineteenth [Seal.] day of June, A. D. 1840, and of the Independence of the United States of America, the sixty fourth.

JOHN FORSYTH.

A bond was filed and approved by the Chancellor, an injunction was issued, and service admitted. Orders of publication against the absent defendants were passed and published. A bill of revivor, in consequence of the death of Thomas H. Lockett, was also filed, and his administrator, Somerville Pinkney, made a party to the cause, and having filed his answer, moved for a dissolution of the injunction. After hearing this motion, the Chancellor [BLAND,] continued the injunction until final hearing or further order; from which order the said S. Pinkney, administrator of T. H. Lockett, appealed.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, and CHAMBERS, JJ.

S. Pinkney and J. Johnson, for the appellants. T. S. Alexander, for the appellees.

STEPHEN, J. delivered the opinion of the Court. Although the discussion in this case has been expanded over a large surface, and has involved within its range the entire merits of the original controversy, we think the true question presented for our consideration lies within a very narrow compass. The appeal has been taken from the order of the Court below, continuing the injunction granted by the Chancellor, and upon the correctness and propriety of that order, it now * becomes our duty to decide. The bill filed, upon which the injunction was obtained, seeks to open the decree of this Court, passed in the original cause, and to subject the merits of that decree to the examination and correction of a subordinate

jurisdiction. We cannot suppose that it was the intention of the Legislature, when they passed the Act under which this suit has been instituted, to authorize such a proceeding, as the exercise of such a jurisdiction, by an inferior tribunal, would present, and such was not the intention of this Court, in the opinion expressed by them, when they spoke of the relief to be granted by the Chancellor, upon a proper application to be made to him for that purpose. The sound and proper construction of the law of 1795, chap. 88, will not warrant such a proceeding, nor is there anything in the language of this Court which was intended to give countenance to the idea, that they designed to open afresh, between the parties, the litigation in the original controversy. The language of the Act of 1795 manifestly discriminates between a proceeding before, and after, a decree has taken place against a non-resident. Before the decree has passed, the language authorizing the action of the Court is broad and comprehensive. It is, "there shall in all respects be the same proceedings before a decree, as if the defendant or defendants had appeared regularly on the return of a subpoena." After the decree has passed, the language is more restrictive, and clearly warrants nothing more than a review of the decree itself, according to the established principles of equity jurisprudence. The terms used, in substance are, that any person being a non-resident, against whom a decree shall be passed, may appear in the Chancery Court within a limited period, "and require a review of the same," and the Chancellor shall proceed to an examination of the matters in dispute, and to a final decree, in the same manner as if the defendant had originally appeared; it was therefore evidently not the intention of the Legislature to give to the party the same latitude of controversy in both cases, but to limit and confine the party, after a decree had been made against him, to such remedial justice, as a technical bill of review might be

83 *competent to afford; and to a defendant in default, such a proffered measure of relief, could, we think, afford no reasonable cause of complaint. It is moreover to be remembered, that according to the established principles of Chancery practice, a bill of review is the appropriate remedy to correct or alter a decree, either for error apparent, or by reason of the discovery of new and relevant matter, after the decree has been passed; and that an original bill is never proper to be resorted to, except where the decree is to be impeached on the ground of fraud. In conclusion, we will only further remark, that after a decree has been passed against a non-resident in the Court of Chancery, and on appeal has been affirmed in this Court, no bill of review would properly lie, for error apparent, on the face of the decree, as the exercise of such a jurisdiction by the Court of Chancery would be subversive of that subordination, which has been established by the judicial Constitution of the State. But the bill of review which would lie in such a case must be founded upon new matter discovered since the decree; in that sense it was the inten-

tion of this Court to be understood, when the question was brought before them for their decision. The order of the Chancellor continuing the injunction is reversed, and the cause remanded for further proceedings. *Order reversed, and cause remanded.*

HENRY D. HATTON vs. WILLIAM L. WEEMS.—December, 1841.

When the Court is divided upon a motion to dismiss an appeal, the motion does not prevail. (a)

Under the Act of 1820, chap. 161, a final decree is irregular, and liable to be reversed on appeal, unless before the decree, the commission had lain in Court, one entire term. (b)

It is the practice of the Court of Chancery when the defendant appears and answers, and the case brought to an issue, the commission, after its return, lies one whole term before the cause is ready for a final decree. (c)

The terms of the Court commence and terminate on certain days; and a term comprises the whole intermediate period. (d)

* At each term of the Court of Chancery there is a specified period 84
denominated its sittings; as at December Term, the sittings commence with the commencement of the term, and end on the third Tuesday of January next ensuing; a cause ripe for decree may be called up and argued or submitted at any time during the sittings, but not after the sittings are over, except by consent.

Where the rule security for costs is entered on the docket irregularly, the Chancellor cannot be called upon to enforce it.

Where the non-residence of the complainant appears on the face of the bill, the rule security for costs may be laid on the docket during the sitting of the Court. (e)

Where the non-residence of the complainant does not appear on the bill, the question of security for costs must be brought before the Court by petition, and a special order obtained.

A defendant in default for not appearing and answering a bill, while in default, cannot lay the rule security for costs.

A prayer of appeal is a waiver of the right to demand security for costs.

Any proceeding in a cause recognizing the complainant's right to sue, takes away the defendant's right to have security for costs.

When the right to ask security for costs is once waived or abandoned, the filing of a supplemental bill of revivor by an administrator, does not revive that right.

H. devised in 1822, to his son and his heirs, a tract of land, in trust, to permit the testator's daughter to have all the rents and profits arising therefrom during her natural life, and after her death to her children lawfully begotten, but if she should die without lawful issue, then I give

(a) Cited in *League vs. State*, 36 Md. 265. See also, *Gregg vs. Baltimore*, 14 Md. 508.

(b) Cited in *Gray vs. Veirs*, 33 Md. 21.

(c) See Equity Rules, No. 48.

(d) Cited in *Rowland vs. Glenn*, 2 Md. Ch. 369.

(e) See *Mayer vs. Tyson*, 1 Bland, 559; Rev. Code, Art. 63, secs. 9, 10.

and devise the said land to my said son and his heirs forever: Another item of the will devised various slaves, male and female, "on the same terms," the testator had given the land, and another clause gave also on same terms, one-half of his stock, plantation utensils, and household and kitchen furniture. The testator gave the residue of his estate to his said son, whom he also appointed his executor.

Held under this will—

1. That the daughter took an equitable estate tail, which in this State is converted into an estate in fee, in the lands devised to her. (*f*)
2. That in the personal property she took an absolute estate.
3. That the limitation over to the son being after an indefinite failure of issue, is void. (*g*)
4. That the bequest being of both male and female slaves, and the testator intending that all should go over on the same event, the character of the subject-matter of the bequest, as in the case of *Briscoe vs. Briscoe*, 6 G. & J. 232, does not make the limitation over valid.

A guardian cannot incroach on the capital of his ward's estate without the order of the Orphans' Court, nor can the real estate of the ward be diminished, but by the approbation of the Court of Chancery.

85 * A trustee ought not to incur expenses, impairing the principal of *c. q. t.* estate, without the approbation of a Court of Chancery.

Expenses which a trustee must necessarily incur, and which can be clearly and satisfactorily seen by the Court, ought to be allowed, as the Court on application at the proper time would have allowed them. (*h*)

(*f*) Examined in *Stump vs. Jordan*, 54 Md. 639-635, where the Court said: "No reasons are assigned, and no authorities are cited in support of the construction that Mrs. Weems took an equitable estate-tail in the land, and we are left to conjecture on what grounds this construction proceeded. Such a decision can, of course, be received as a binding authority only in a case where the same, or substantially the same, words are used. But in our opinion there is a substantial difference between the language of Hatton's will and that used in this case. In the former, the terms of the devise over are, 'in case she should die without lawful issue to heir the above mentioned land.' These are the exact words of the will as set out in the original record in the case which we have examined, and they are the words used in the manuscript opinion of Judge ARCHER, which we have also examined. There is therefore a misprint in the opinion as reported, (12 G. & J. 108.) of 'to have' instead of 'to heir.' The Court may have considered this language as plainly indicating the testator's intention to let her children or issue take as heirs of his daughter. In the absence of any intimation to the contrary, it is not unreasonable to suppose the decision was rested upon the force of the words 'issue to heir' the estate, and there are no such words in the will now before us."

(*g*) Cited in *Edelen vs. Middleton*, 9 Gill, 166; *Budd vs. State*, 22 Md. 57; *Browne vs. Trustees*, 37 Md. 121; *Usilton vs. Usilton*, 3 Md. Ch. 38. See *Dallam vs. Dallam*, 7 H. & J. 172, note (*b*). Under Rev. Code, Art. 49, sec. 9, a devise to one with a limitation over, after a failure of issue is construed to mean a failure of issue in the life-time, or at the time of the death of the first taker, and not an indefinite failure of issue, unless a contrary intention shall appear.

(*h*) Cited in *Druid Co. vs. Oettinger*, 53 Md. 63; *Abell vs. Brown*, 55 Md. 226, holding that a trustee may do that without a special order, which equity, on a case made, would order.

If a trustee has mixed trust property with his own: kept no accounts of the produce of the labor of slaves held in trust, nor of their clothing and maintenance, nor of the clothing of his *c. q. t.*; then by reason of his own misconduct and negligence, he is liable to have his expenses set down at their lowest estimate.

When it was in question what allowances should be made a trustee for raising infant slaves, and the same estate had been under the care of a receiver of the Court, when similar expenses had been incurred, the Court as against a delinquent trustee who has kept no account, considered the actual disbursements of the receiver as furnishing a better guide to truth and justice, than an average of the opinions and estimates of witnesses, of what, in their judgments, would be a fair price.

The Chancery Court for attaining justice, where the record furnishes no other means of arriving with more certainty at the truth, will average testimony of values; but this rule has exceptions, and is not of universal application.

The opinions of persons accustomed to furnish boarding and lodging, is of more value than opinions estimating the value of such services without actual experience; neither, however, is conclusive, but the Court will consider the relation of the parties, and other circumstances, as between trustee and *c. q. t.*

A trustee, under circumstances, allowed the whole income of his *c. q. t.* for board and maintenance, and taking care of her real and personal estate; and also in analogy to executors and administrators, was allowed commissions on the products of real estate, and on the income of the personal estate, and the value of the latter as it came to his hands. (i)

By the Act of 1798, chap. 101, the right of a surviving husband to sue for the personal estate of his deceased wife is conferred, just as if he had administered upon her estate.

When the assets are in Maryland, the right to sue exists, though the wife may have died in another State.

Marriage and issue born alive, entitle a surviving husband to recover the personal property, and the rents and profits of the lands of a deceased wife.

Where the Court has to modify and reform a decree, and each party has to some extent succeeded, each party should pay their own costs in this Court.

CROSS-APPEALS from Chancery. On the 21st December, 1832, William L. Weems, and Mary his wife, filed their bill in Chancery, alleging that Henry Hatton, father of Mary, departed this life in the year 1824, having devised to his son, the appellant, one hundred and fifty acres * of land, whereon the testator then dwelt, a 86 number of negroes by name, and also one-half of his stock, plantation utensils, household and kitchen furniture, all which were so devised in trust for the said Mary, and to permit her to have all the rents and profits arising therefrom, in the manner stated in said will, which was exhibited with the said bill; that appellant was ap-

(i) Approved in *R. R. Co. vs. Keighler*, 29 Md. 580; *Higgins vs. Higgins*, 4 Md. Ch. 245. See *Ringgold vs. Ringgold*, 1 H. & G. 11, note (g).

pointed executor of said will, and gave bond as such, for the payment of debts and legacies, and of course has returned no inventory which would enable the said Mary to ascertain what her estate was; that appellant has been in the possession of the property left him in trust, made crops on the land, employed the negroes on his own farms, made thereby large sums of money, rendered no accounts, and refuses to account; that he has cut down and applied to his own use, large quantities of timber growing on the said lands, taken away some of the houses thereon, and in violation of his trust, sold some of the negroes, and claims to retain them all. Prayer for an account—appellant's removal from the trust; delivery up of the whole of the trust property, and for general relief, &c.

The will of H. D. Hatton, exhibited with this bill, was dated 7th September, 1822, and admitted to probate on the 15th November, 1824. It devised as follows:

"Item.—I give and devise to my loving and faithful son Henry D. Hatton, for the trusts hereinafter mentioned, one hundred and fifty acres of land, whereon I now live—beginning at, &c., to hold the same to the said Hatton, and his heirs in trust; that he permit my loving daughter, his sister, Mary R. Hatton, to have all the rents and profits arising therefrom during her natural life, and after her death, to her children, lawfully begotten; but if she should die without lawful issue to heir the above mentioned land, then and in that case, I give and devise the said land to my beloved son Henry D. Hatton, to him and his heirs forever.

"Item.—I also give in trust to my faithful and loving son, Henry D. Hatton, for my loving daughter, his sister Mary R. Hatton, on the same terms that I have given the aforesaid one * hundred and
87 fifty acres of land, the following negroes, namely: Frank, Hendley, &c., &c.; Rose, Kitty, Matilda, &c., twenty in all, and their increase; also Kitty's children and Matilda's child.

"Item. Also one-half of my stock, plantation utensils, and household and kitchen furniture, I give in trust to my said son, for my said daughter, in the same manner as the aforesaid land and negroes.

"Item. It is my wish and desire, that my said loving daughter, and the aforesaid property, should be under the immediate protection, care and direction of her loving, faithful brother, Henry D. Hatton.

"Item. I give and devise to my loving and faithful son H. D. H. all the residue of my property, real, personal and mixed, of every description, to him and his heirs and assigns forever, and constitute him executor of this, my last will and testament, &c."

At September Term, 1833, the 2d October, 1833, the appellant having appeared by counsel and failing to answer, the Chancellor ordered a commission to Prince George's County.

On the 31st October, 1833, the defendant H. D. H. filed his answer admitting his father's will, as exhibited with the bill of complainants, and after stating the particulars of the cattle, stock, household and kitchen furniture, and plantation utensils, of which his father died possessed, denied the sale of any of the trust negroes; that the expenses and trouble of the negroes were worth more than their actual profits, nearly all of them being very old, very young, or breeding women. The answer then detailed the names and ages of the servants at his father's death, and of those since born, and alleged he had greatly improved the land, and had cut down no timber trees, but only some shade trees, which he used; that he had removed some old houses and put improvements of more value on the land; that if justice be done, his sister is his debtor, and not he her's; that she is not entitled to receive at his hands one cent on account of moneys due her by this respondent, before her intermarriage with the other complainant; that he * is entitled to charge his sister for her board, clothing and other necessary expenses, from the death 88 of her father to the time of her marriage in 1832, and that five hundred dollars per annum during said term, considering the style in which his sister was supported by the said appellant, would be a very moderate allowance. The answer then claimed compensation for the defendant's labor, &c., as trustee, and for reasons assigned, suggested that the property ought to be sold and invested under the Chancellor's orders, securing to the appellant his contingent rights, in conformity to the will of his father; and finally denied all violations of duty as trustee.

This answer was received by consent, the evidence taken, and to be taken under the *ex parte* commission, to be read as if the commission had been issued after the answer was filed.

Upon the 24th February, 1834, and on the petition of the complainants, that the defendant had not completed the taking of his evidence under the commission; that he had wantonly injured and wasted much of the trust property, and that in his hands it was in danger of further and irreparable injury; that the complainant's claim against the defendant, was already considerable, and his ability doubtful; that while he retains possession of the trust estate, he will be anxious to postpone its settlement, and that before as well as since the filing of the bill, defendant has shown every disposition to injure the estate—verified by affidavit. The Chancellor [BLAND] appointed a receiver to take possession of the whole estate, after giving bond. The bond being given on the 16th March, 1834, the defendant Hatton answered the aforesaid petition, and denied its several allegations of misconduct and apprehended injury; and after notice of a motion to discharge the receiver, founded upon the defendant's answer, the Chancellor, on the 29th March, 1834, (no one appearing for the plaintiff against the motion,) rescinded the order appointing a receiver.

On the 2d May, 1834, second commission to take proof was issued by consent, and on the 14th August, Hatton petitioned for an order to sell certain negroes, on the ground that they had become refractory, ungovernable, and disposed to run * away; that some
 89 had run away, and some were now in jail for safe custody; this petition was verified by affidavit. The Chancellor ordered a publication of the nature and object of the petition. Upon the 17th March, 1835, the first commission (to G. L. Magruder, Esq.,) and the second (to William H. Tuck, Esq.,) were returned executed, with a great variety of proof. On the 15th June, 1835, by agreement of parties, the cause was submitted to the auditor to state an account or accounts, between the parties, forthwith, to be reported to the Chancellor, subject to exceptions, and reserving all equities; which agreement the Chancellor confirmed. On the 24th July, 1835, the Chancellor authorized Hatton to sell certain of the negroes, as prayed for by him on the 14th August, 1834.

On the 21st July, 1837, W. L. Weems, by petition, suggested the death of his wife Mary, leaving issue an only daughter Mary Ann Weems; that the daughter is also dead; that petitioner has taken out letters of administration upon his daughter's estate, from the Orphans' Court of Prince George's County; that upon the true construction of the will of the said H. D. Hatton, the elder, his daughter Mary R. Hatton became entitled to an equitable estate tail, in the property devised and bequeathed to her, and that the limitation thereof over to the defendant Hatton is too remote, and consequently void; and that the whole estate vested absolutely in the said Mary R. Hatton; that upon the death of his said wife, he, this complainant, became entitled in his own right, and absolutely, as surviving husband, to the whole of the personal estate so bequeathed to her, with the increase of the same, and to claim and recover the possession thereof from the defendant Hatton, and to an account of, and decree for the rents, issues and profits thereof, as well those which accrued in the life-time of his wife, as those which accrued since; and that he is in like manner entitled to an account of, and decree for, the rents, issues and profits of the real estate, so as aforesaid devised to his said wife, and that he is also entitled as tenant by the curtesy. Prayer in conformity.

90 * Upon this petition the Chancellor [BLAND,] on the 25th July, 1837, ordered as follows, viz:

I am of opinion, that the word "children" and the word "issue," as used in the will of Henry Hatton, deceased, must be taken to be words of purchase, and that his daughter Mary R. Hatton, took no more than an estate for life, in the real and personal estate given to her, with a contingent remainder over, of a fee simple estate in the lands, and of an absolute estate in the personalty to her children, and with a similar contemporary remainder to Henry D. Hatton, and that consequently by the death of the plaintiff, Mary R. Weems,

the case abated, and the bill became defective. It is stated in the petition that Mary R. Weems died leaving a child, the fruit of the marriage with the plaintiff William L. Weems, which child is also dead. It is therefore ordered, that this cause stand over with leave to file a supplemental bill of revivor, in such manner and form as may be deemed necessary and proper.

Upon the 29th July, 1837, William L. Weems, administrator of Mary Ann Weems, late of Hickman County, in the State of Tennessee, filed his supplemental bill of complaint and bill of revivor, referring to the previous proceedings in the cause, the facts of his petition of 21st July, 1837, and the order thereon. Prayer that Henry D. Hatton may answer; that the bill may be revived; for the removal of H. D. H. from the trust; account and surrender of the property, &c., and for relief according to petitioner's rights, as they shall be ultimately determined to exist, in any, either, or all of the capacities in which he claims or has claimed, &c.

On the 30th September, 1837, the defendant Henry D. Hatton, having been summoned and not appearing to answer the bill of revivor, the Chancellor decreed that the complainant was entitled to relief, and ordered a commission to take testimony to Samuel A. Baker, in Hickman County, Tennessee. The commission was returned on the 20th November, 1837, executed, and at December Term, 1837, the Chancellor [BLAND,] passed the following order:

"In this case an interlocutory decree having passed on the 30th September, 1837, in consequence of the failure of the defendant to appear or answer according to the rules of the Court, and a commission having issued according to the Act of Assembly, to enable the complainant to prove the allegations of his bill, and the said commission having been returned, and the cause standing ready for hearing, and being submitted on the part of the complainant, the bill and proceedings thereupon, were by the Chancellor read and considered, it is thereupon, this 19th day of January, 1838, by, &c., decreed, that the said H. D. Hatton deliver up and hand over to the complainant, the following negro slaves, bequeathed by the said Henry Hatton to the said defendant, in trust, for Mary R. Hatton, the late wife of the complainant, that is to say, Frank, Hendley, &c., &c., and the increase of the females, born since the death of the said testator Henry Hatton, and Kitty's children and Matilda's child, together with one-half of the stock, plantation utensils, and household and kitchen furniture of the said testator Henry Hatton. And it is further, &c., decreed, that the said defendant account with the said plaintiff, of and concerning the rents, issues and profits of the real estate, devised by the said testator, to the said defendant, in trust for the said Mary, the late wife of the said complainant, from the period of the death of the said testator, to the death of the said Mary R., and from the death of the latter to the death of the said Mary Ann Weems, the intestate of the com-

plainant; and that he account in like manner with the said complainant, for the hire and profits of the aforesaid negroes, and the increase thereof, and for the other personal property bequeathed to him, the defendant as aforesaid, in trust, for the use of the said Mary, &c., from the pleadings and proofs now in the cause, and such other proofs, as may be hereafter taken in the usual manner; and for the purpose of taking said accounts, this cause is referred to the auditor, with directions to state the necessary accounts."

From this decree the defendant prayed an appeal, but gave no appeal bond, the penalty of which had been prescribed by the Chancellor at \$10,000.

92 * On the 3rd February, 1838, the defendant filed a petition praying that the decree of the 19th January, 1838, might be rescinded; and after stating the proceedings to the filing of the bill of revivor, alleged, that on the 30th December, 1837, the complainant being a non-resident of the State of Maryland, the defendant moved for and obtained a rule on the complainant to give security for costs, which has never been complied with, notwithstanding which a final decree was passed, which ought now to be rescinded, and proceedings suspended, until security given; that upon the security being given, he is ready to file his answer to the bill of revivor, and was not aware that security for costs had not been given when his appeal was entered, and has dismissed his appeal with this petition. The defendant tendered his answer.

The Chancellor permitted the petition of the defendant to be answered by oath of the solicitor of the complainant; and on the 20th February, 1838, being of opinion that under the circumstances of this case, the rule security for costs could not have been enforced, and therefore the decree should not be set aside, because it had not been previously disposed of; and further, that the opening of the decree on the ground proposed, would as has been laid down, lead to the establishment of a lax principle of practice that would be productive of the most deleterious consequences in the administration of equitable jurisprudence.

From this order and the order of the 19th January, 1838, the defendant Hatton prayed an appeal, and gave bond which was approved—afterwards set aside, upon petition and proof of insufficiency, and a new bond filed.

Upon the 29th November, 1839, the auditor made his report, accompanied with a variety of accounts and statements, which were made the subjects of exception by both parties, and on the 20th March, 1840, the Chancellor [BLAND,] referred the cause again to the auditor, with directions "that in the absence of positive and direct proof of value, and where the witnesses differ in their estimates or opinion of the value of any subject involved in the account
93 desired to be stated, an * average value is to be taken and assumed, not by the number of witnesses, but by striking an

average from the various values from nothing, and the several amounts as specified in the testimony. An estimate of the rents and profits of the real estate is to be made from the testimony, in regard to its actual or capable amount of regular annual agricultural productions, including as an addition thereto, a charge for any waste that may have been committed, as by the removal of house, the selling or taking timber for fence rails, &c., and deducting therefrom an allowance for repairs of edifices, or by putting up fences not gathered from the land itself. All personal property given in trust by the testator, must be accounted for, and delivered up to the *cestui que trust* or plaintiff; or when it appears to have been converted, or lost by the default of the trustee or defendant, he must be charged with its value. The trustee is to be charged, with the value of each slave, during the time such slave was held by him, according to the annual amount which such slave was capable of earning, without any default of the trustee, with an allowance to the trustee, for the maintenance of any such slave, during the period of his infancy or imbecility, or for loss of profit during his absence as a runaway, and also for expenses incurred in apprehending such runaway slave. The trustee may be justified in selling a slave, or sending him abroad to be sold, on the ground of its being necessary, owing to the ungovernable nature of the slave, to save such property from total loss, and therefore the facts and circumstances upon which the trustee proceeded to make sale of any such property, must be stated by the auditor. The trustee is not to be charged with the profits of any property, during the time it was in the possession and use of the *cestui que trust*, nor during the time it may have been legally out of, and withheld from his possession. The parties are allowed the usual time to take further testimony. In regard to the agreement filed on the 13th inst., it is declared that all further proceedings under the order of the 22nd February, 1838, have been finally closed 94
* by the order of the 31st March, 1838. All exceptions at variance with this order overruled.

On the 30th August, 1840, the auditor made a further report, with various accounts and statements, to which the defendant filed exceptions. These were overruled *pro forma* by consent, and on the 2nd October, 1840, the Chancellor [BLAND,] decreed as follows:

It appears from the auditor's report, that upon a settlement of the accounts of the defendant (Hatton,) as a trustee, from the commencement of his trust to the time of the death of Mary R. Weems, there is due from the said trust estate to the said defendant, the sum of \$3,527.13, and that upon a settlement of accounts between the said defendant and the complainant, as administrator of Mary Ann Weems, from her death to 30th August, 1840, for the profits of the said estate, from the death of the deceased to the 19th January, 1838, and interest thereon, there is due from the said defendant to the said complainant, as administrator as aforesaid, the sum of

\$354.75. It is further decreed, that the said defendant hath, and he is hereby declared to have, a lien on the trust negroes now in his possession, to secure to him the payment of the sum of \$3,172.38, being the difference between the sums of money hereinbefore mentioned. And that upon the complainant's paying, or bringing into this Court to be paid to the said defendant, the aforesaid sum of \$3,172.38, with interest on the sum of \$2,661.65, part thereof, from the 30th August last, until so paid, or brought in, the said defendant (Hatton,) shall be and he is hereby required, to deliver to the said complainant, such and so many of the negroes mentioned in the decree, passed in this cause on the 19th January, 1838, with their increase, as shall or may at that time be living and in his possession, or under his control, together with the profits of the said slaves, from the said 19th January, 1838, with their increase, until they shall be delivered or sold, as hereinafter directed; and the auditor is hereby directed to state an account thereof, from the proof and proceedings now in the case, and from such other evidence as may be laid before him; provided *that such proof be

95 taken before some justice of the peace, on three days notice as usual, and filed on or before the delivery or final ratification of the said sale, as hereinafter directed. The decree then proceeded to provide for a failure by the complainant, to pay the balance due the defendant, and for default thereof, ordered a sale of the negroes, and appointed a trustee on the usual terms and conditions, to effect that purpose. From this decree the defendant appealed.

The complainant also appealed from the order of the 20th March, 1840, and from the final decree.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Alexander, for Hatton, insisted, that under the Act of 1830, chap. 185, the appeal should be dismissed; the decree appealed from was not final, nor in the nature of a final decree. The decree of the 20th March was an order for the payment of money into Court, and upon default thereof, a sale of personal property was ordered; a further account than the one which appeared in the record, was necessary to settle the rights of the parties finally; in such cases the right of an immediate appeal is denied by the Act of 1830. It is true the Act 1841. chap. 11, (passed on the 15th January, 1842, some thirteen days since,) repeals so much of the Act of 1830, as takes away the immediate right of appeal upon such orders as the one appealed from. But still, the last Act, under the Act of 1837, chap. 261, does not take effect until the 1st June, 1842. The repealing law contains no words to show when its operation shall commence. It takes effect under the general law of 1837, only. The second section of the Act of 1841, declares, that it "shall extend to appeals already taken, as well as to those hereafter to be taken, and the Court of Appeals

shall proceed to hear and determine such appeals, as if the right of appeal had existed at the time such appeals were taken." This language, however, does not bring the case within the Act of 1837—which, after declaring from what period all laws affecting, or relating to the * general administration of justice shall take effect—provides that the General Assembly "shall have the power by **96** express words, to be inserted in any such Act, to declare that the same Act shall have operation on and after a different day." Now the Act of 1841, chap. 11, has inserted in it no express words relating to a different period than the 1st June next—nor express words relating to any day—nor equivalent expressions. If the repealing law does not operate until 1st June next, this appeal must be dismissed, as this Court then would have no jurisdiction.

The appellants further contended—

1. The decree of the 2d day of October, 1840, is predicated on the previous decree of the 19th day of January, 1838, from which the appellant likewise appealed, and the said previous decree was improvidently entered.

1. Because at the date thereof, the rule security for costs had not been obeyed by the complainant, nor any proceeding had to discharge it. 6 *Ves. Jr.* 212; 3 *Cow.* 73.

2. Because at that date, the case did not stand regularly for hearing. 11 *G. & J.* 426.

2. There is not sufficient evidence in the record of the complainant's title to maintain this suit. He claims to be the administrator of one Mary Ann Weems, who, it is pretended, was the daughter of the complainant, and his deceased wife, and who is supposed to have since died intestate. But the supposed evidence of the birth and death of that child, was irregularly taken under a commission, issued *ex parte*, and executed and returned without notice to the defendant, and no sort of proof whatever has been produced of the grant of administration on the estate of that child to the complainant.

3. That the decree of the 19th day of January, 1838, even if it had been regularly entered, ought to have been opened upon the application of the defendant, which was made during the term, and before enrolment of the decree, and especially, as the decree was shown to be erroneous in awarding delivery of negroes, who were shown by the proceedings, to have died before that time.

* 4. Upon the merits.—The title to the personal property alone **97** is in question in this suit. It is conceded that the limitation over to the appellant was dependent on an estate in tail, previously given to Mary R. Hatton, the appellee's late wife, or to her children, and it is immaterial to determine in whom such estate vested. It is likewise conceded, that the limitation over of the stock, plantation utensils, and household and kitchen furniture, is too remote, and therefore void. But it will be insisted, that the case of *Biscoe vs. Biscoe*, 6 *G. & J.* 364, is an authority in point to show that the appellant, as

ultimate legatee, is entitled to the male negroes in being at the testator's death, and upon the principles established by that case, the appellant will also claim the female negroes in being at the testator's death, with all their subsequent increase. 4 *H. & J.* 441; 11 *Wheat.*; 3 *H. & McH.* 393; 4 *Kent Com.* 222; 6 *G. & J.* 364.

5. That the auditor has charged the appellant with the estimated value of the stock, plantation utensils, and household and kitchen furniture, whereas there is no evidence whatever of the conversion of that property by the appellant. In the absence of such evidence the appellee is bound to take the specific property itself, and cannot elect to charge the appellant, the trustee, with the imaginary value thereof.

6. That the auditor has charged the appellant with the estimated value of fences removed by him, whereas the evidence in the cause is not sufficient to prove any removal, as is alleged; but on the contrary is abundant to show that the fences on the trust estate were repaired with materials procured from the trustee's own estate.

7. That the auditor has charged the said appellant with the hires or values of negroes belonging to the trust estate, for which he is not liable, as for example: for Frank, who is shown to have been shipped to a foreign market, and lost on the voyage—for Louisa, who continually waited on her mistress until the year 1832, when she died—for Henly, Romeo, and Lantz, who died in the year 1837.

8. That the principle of average adopted by the auditor, is **98** * erroneous, and in opposition thereto it will be insisted, that the average is to be determined by adding together the estimate of every witness, and dividing the sum of those estimates by the whole number of witnesses.

9. That the appellee has failed to show any title in himself to any part of the property. Assuming that the property vested in the children, he has not averred or proved that the child, whom he represents, was the only child left by his wife; but, in truth, the estate tail vested in the wife, and he has not averred, nor shown, that he is the representative of the wife.

J. Johnson, for Weems and wife. Insisted that the Act of 1841, gave an immediate right of appeal in this cause, and that the Court would now hear and decide the cause, irrespective of the Act of 1837. It was the clear intention of this Act, that this cause should now be heard. The Act applies to appeals theretofore taken, which are to be heard and determined as if the right had existed at the time of appeal taken. The words are express, that now the appeal is to be heard; they relate to a time present, which is a different time from the 1st June next. The motion to dismiss will, therefore be overruled.

As to the rule security for costs not being complied with, the answer of Hatton was received under an agreement, and he was in default from the commencement of the suit until that answer was

filed in 1834. He knew that Weems was a non-resident, and did not lay the rule for three years after his knowledge. This is a waiver. *Alex. Prac.* 56; 1 *Bland Rep.* 561; 2 *Bro. C. R.* 609.

In support of the appeal, on the part of the complainant Weems, he insisted—

1. That the limitation over to the defendant, Henry D. Hatton, of the property, real and personal, given to him by the will of his father, Henry Hatton, in trust for his sister, Mary R. Hatton, (afterwards Mrs. Weems,) was too remote and void. 4 *Kent Com.* 222; 1 *H. & G.* 111; 7 *H. & J.* 220 3 *G. & J.* 199; 6 *G. & J.* 232.

* 2. That if the said limitation was good, still, as Mary R. Hatton did leave lawful issue living at the time of her death, 99 the contingency upon which the limitation to the defendant was to take effect, did not happen, and consequently he has no title to the property.

3. That the order of the 20th March, 1840, so far as it directs that the average should be taken, according to the various values placed by the witnesses upon the subjects involved in the accounts, established the true rule.

4. That the said order, however, was erroneous, as was the final decree of the 2d of October, 1840, in allowing the defendant a larger sum for taking care of the trust property, and supporting the *cestui que trust*, than the income or profits of the estate amounted to. 1 *Sch. & Lef.*; 14 *Ves.* 499; 6 *Ves.* 473; 2 *McCord*, 55; 24 *Law Lib.* 229; *Chan. Rep.* 158.

5. That the said order and decree were also erroneous, in allowing the defendant any thing for the preservation or care of the trust property, or for the loss or destruction of any portion of it after the period when he was bound to have surrendered up the possession of it.

McMahon, also for Weems, in reply upon Hatton's appeal. It is said the decree was prematurely obtained during the pendency of a rule security for costs not complied with. If the bill discloses the fact, that complainant was a non-resident, then the knowledge of the defendant is conceded. If after this, he takes any step in the cause conceding the complainant's right to a standing in Court, the right to enforce the rule is gone. *Mit. Ca.* 55, 56; 3 *John. C. R.* 520; 1 *John. C. R.* 202; 12 *Con. Ch. Rep.* 501; 2 *Bro. C.* 609. But the rule here is a nullity, from the mode of obtaining it. The right to the rule does not depend on change of title in the prosecution of the suit, but upon the original rights of the defendant. Amendments change title with reference to the subject-matter—do not give new rights to the rule. They are no revival of the rule. A party in default and in contempt cannot lay a rule. 3 *Equity Digest*, 271. Process for * want of appearance and answer, is a bar to the rule. After the rule 100 laid, an appeal is a waiver. The commission had lain an entire term before the decree. Then had the Chancellor a right to decree in

vacation, after evidence had so lain. 7 *G. & J.* 87, 379. An answer admits the right to revive. *Mitf.* 353; 2 *Simon*, 465; 2 *O. C. R.* 501; 11 *Price Ex.* 58; 5 *Eng. Con. Ex. Ch.* 58. After revivor, the defendant cannot put in new matter, and make a new defence. *Alex. Prac.* 105; 11 *Price*, 117; 1 *Ry. & Myl.* 28; 1 *Hoffr. Pr.* 180.

The Act of 1820 does not enlarge the right to file an answer.

R. Johnson, for Hatton, in reply upon his appeal, and upon the appeal of Weems. The Act of 1841 does not take effect until the 1st June next. 6 *Bro. P. C.* 557; 1 *Kent Com.* 457.

Under the Act of 1820, chap. 161, after the return of an *ex parte* commission, the cause is to be proceeded in, as if the commission had issued after answer filed. The commission must lay a whole term. *Md. Ch. Prac.* 112. "To shew cause," is to be heard at the term next succeeding that to which the commission was returned. 7 *G. & J.* 281. The commission here was returned to December Term; but in the recess of two terms. In point of law, the cause was not for hearing until March Term. The decree was passed too early. The rule security for costs was laid on the docket. Why was a petition and affidavit necessary? If the non-residence appears on the proof, why may it not be granted? As the rule was passed, there was no right to dispense with it, and pass a decree without notice. Upon the effect of the devise to Mrs. Weems, as regards herself, and the devise over to her child and the defendant, the counsel cited—7 *H. & J.* 220, 236, 244, 247; *Oro. Jac.* 590, 246; 1 *H. & J.* 115; 3 *G. & J.* 119; 2 *H. & G.* 42; 6 *G. & J.* 232. Treated as a devise of negro men and women, living at the death of the testator, it is valid as an executory *devise. *Briscoe's Case*, as reported, **101** does not mean a failure of issue at the death of the first taker; but a failure of issue at the death of the subject of the devise, which is an event within the prescribed limits. As the devise over is a life in being, the words without lawful heir are not too remote. 1 *P. Wms.* 663; 1 *H. & G.* 115; 4 *H. & J.* 441; 3 *H. & McH.* 393.

On the third point of the appellant's, the counsel contended, that the decree ought to have been opened during the term, as applied for. The 3d section of the Act of 1820, conferred an absolute right to file an answer. The Chancellor had no right to determine *in limine* what sort of an answer would be filed. The dismissal of our petition deprives us of the right conferred by the third section of that Act.

McMahon, in reply upon Weems' appeal. The decree in this cause leaving nothing open—the principal rights all settled—there was nothing left to be enforced except incidental profits of the personal property arising after the decree. It is, therefore, final. So a sale of mortgage property is final. The existence and accrual of consequential rights, cannot differ the question. The Act of 1841 is inconsistent with the Act of 1837, and the fullest effect must be given to the last Act. The Act of 1837 was to remedy mischiefs as to

future legislation. It has no relation to past legislation. But the Act of 1841 speaks of decrees heretofore passed. It speaks backward to the time of appeal, and gives the right. It was intended to antedate and benefit appeals taken, and to be taken, and to cover all cases. The only object of the construction contended for, on the motion to dismiss, is to bring the appeal back again. The Act speaks of all classes of appeals depending and to be prosecuted, and left open no chasm or period under the Act of 1837.

The cause was referred to the auditor, and hence the defendant had no right to file an answer.

Then who has the right to administer and distribute the personal property of a deceased wife? At common law the * husband. The right of administration is decided by the *locus* of the property. The husband takes it as administrator—he is liable as administrator, liable of course to payment of her debts. **102**

The estate which Mrs. Weems took under her father's will is not an estate tail by implication. It is an estate to her for life—remainder to her child in fee, and if she dies without child, then a remainder over by way of executory devise. This disposes of the whole case. All limitations over are defeated by the birth of her child. The limitation is, that if she have no child. 1 *H. & G.* 116. The construction contended for on the other side changes the terms of the will. This will puts real and personal property on the same ground and intent. The testator designed no separation.

As to the accounts, by the views on the other side, the longer this estate remains in trust, the worse it gets, and ultimately the whole estate gone, with the maintenance of the *c. q. t.* to boot. On this subject the counsel cited—1 *Vernon*, 254, note; 2 *Sch. & Lef.* 34; 2 *Jacob & Walker*, 253; 6 *Ves.* 473, particularly; 1 *Ball & Beatty*, 240; 2 *Nott & McCord*, 57, 199, 211.

These cases relate to executors, guardians, trustees of infants, where one party is under the care of another; to guard against abuses. Trustees, in such cases, not permitted to exceed the income entrusted to them, but by permission of a Court of competent jurisdiction. The record shows the tenant in tail, in this case, was a weak-minded, helpless woman, an imbecile dependent, who did not know that the charges now made would swamp her whole estate. She was peculiarly a ward of Court, and no vouchers are produced. A trustee dealing with trust property is bound to account fully and particularly. He cannot expend all the money and profits of his *c. q. t.*, and claim for greater expenditures out of her estate.

ARCHER, J. delivered the opinion of the Court. On the motion to dismiss these appeals the Court are divided in opinion, and the motion to dismiss cannot, therefore, prevail.

* We shall proceed to examine the questions which have been submitted on the appeal. **103**

The appeal from the decree of the 2d day of October, 1840, brings up not only that decree for examination, but the decree of the 19th of June, 1838, and the order of the 20th February, 1838.

Objections have been made on the merits which are common to both decrees, and objections have also been made to the regularity of the decree of 1838.

Two objections have been taken to the decree of 1838, and it is therefore said to have been improvidently entered.

1st. Because at its date, the rule security for costs had not been obeyed by the complainant, nor any proceedings had to discharge it.

2d. Because at the date of the decree, the cause did not stand regularly for hearing.

The first question we shall examine hereafter, when we shall come to consider the Chancellor's order of the 20th February, 1838. Our views on the second question renders the examination of the first in this place unnecessary. We believe the second objection to be decisive against the validity of this decree.

By the decision of this Court, in *Palmer & Hamilton vs. Oliver's Ex'rs*, 11 G. & J. 426, in which, like this, there was an interlocutory decree, and an *ex parte* commission, it was determined that the decree was irregular, and liable to reversal, according to the true construction of the Act of 1820, ch. 161, unless before decree, the commission had laid in Court one entire term; and it was further decided in that case, that the commission, in the language of the Act of Assembly, should be issued, proceeded in, and returned in the same manner, and that the Court should proceed to a final decree in the same manner as if the defendants had appeared and put in their answers. Has the Court in this case proceeded to a decree in the same manner as if the defendant had appeared and answered? According to the established and uniform practice of the Court of

104 Chancery, where the defendant appears and answers, the *case is brought to issue, and a commission issues and is returned, it lies one whole term, before, by its rules, it is ready for decree. The same rule, as we have seen, is applicable to a final decree, taken under an interlocutory order and commission, under the Act of 1820, ch. 161. And the question is, has the commission laid in Court one whole term? This involves the enquiry, what is a term of the Court of Chancery, and its duration, according to its rules and practice? The September Term commences on the fourth Tuesday of September, and terminates on the first Tuesday in December following, when the December Term commences, and continues until the second Tuesday in March.

The commission was returned on the 20th of November, 1837, (during the September Term,) and the case was laid before the Chancellor, by the defendant, on the 19th day of January, 1838, during and before the close of the December Term. The decree having been made before the commission had laid one whole term in Court,

was made at a period when it could not rightfully have been made, and was therefore irregularly and improvidently entered. But if the above views were wrong, it is still certain that the decree was improvident, upon the ground, that it was presented to the Chancellor for decree after the termination of the sittings of that Court, as of December Term. By the rules of the Chancery Court, the sittings commence with the commencement of the December Term, and end on the third Tuesday of January, which, in the year 1838, happened on the 18th day of January. If the cause had been ripe for decree, it might have been called up and argued, or submitted at any time during the sittings; but not after the sittings are over, without consent. That was done in this case; so that upon either ground, the Chancellor's decree of January, 1838, was improvident, having been passed at a time, and under circumstances, not authorized by the Act of 1820, chap. 161.

The next subject for decision, is the question as to the correctness of the Chancellor's order of the 20th of February, 1838, dismissing the petition of the defendant, praying that * the decree of 19th January, 1838, may be set aside. The petition sought **105** that the decree might be set aside upon the ground, that the petitioner had, on the 30th of December, entered on the docket a rule security for costs, and that this rule was not disposed of when the decree of 19th January, 1838, was passed. The petitioner does not propose to file his answer, but states he will do so if the decree be set aside, and he concludes his petition with a prayer, that the decree may be set aside; that complainant may give security for costs, and that within a limited time thereafter, he may be permitted to file his answer. The Chancellor dismissed the petition upon the ground, that the rule security for costs could not be enforced; that its previous disposition was immaterial, and that to gratify the petitioner, would lead to a lax practice, injurious in its consequences.

We are of opinion, with the Chancellor, that the rule security for costs could not have been enforced. The rule was entered on the docket irregularly. The practice of the Court of Chancery in this respect, is well stated in *1st Bland's Ch'y*, 561, to be, that when the non-residence of the complainant appears by the bill, such a rule may be laid on the docket during the sittings of the term. But that where the non-residence of the complainant does not appear on the face of the bill, the matter must be brought before the Court by petition, and a special order obtained. In this case the non-residence did not appear by the bill; the matter was not brought before the Chancellor by petition, and the rule on the docket was wholly irregular. The defendant was in default for not appearing and answering, and while he was so in default, he could not lay a rule security for costs. He waived, moreover, the right to demand security for costs, by praying an appeal; the settled doctrine being, that any proceed-

ing in a cause, recognizing the complainant's right to sue, takes away the defendant's right to have security for costs.

But again, on the 16th March, 1834, the defendant filed his answer to the application of the complainant, for a receiver, in which his knowledge of the non-residence of the *complainant is admitted; and after that, on the 14th of August, 1834, he files his petition to the Chancellor for a sale of some of the negroes. It is very certain that this proceeding would, according to the authorities, have prevented the defendant from demanding afterwards, and before the bill of revivor, security for costs; and we think it would equally prevent such an application after the filing of the supplemental bill of revivor, for that is but a continuation of the former suit, with not a different complainant, but the same complainant, reviving the suit, as administrator of his daughter.

But it is urged, that although the rule may have been irregularly laid, and that although the defendant may not have had a right to the rule, still the rule having been laid, it should have been disposed of before the decree of 19th January, 1838, could regularly pass. We think, however, differently; there could be no reason to set aside a decree otherwise correct, merely to put out of the way an order which must necessarily have been disposed of. The whole effect of such a proceeding would be, to set aside the decree, to get rid of the rule, and then decreeing again. The petition cannot be considered as an application to the Chancellor to file his answer, for that he only proposes to do, upon the rule security for costs being enforced. What the Chancellor, therefore, has done, cannot be considered as a rejection of the defendant's answer, nor can it be said that the course of the Chancellor in dismissing his petition, defeated him in filing his answer to the bill of revivor, for the decree of the 19th January, 1838, was either a final decree under the Act of 1820, chap. 161, or it was not. If it was a final decree, he had no right under that law, and in the circumstances of his case, to file an answer; if it was not a final decree, within the meaning of that Act, the law gave him the right of filing his answer, which he has not asked or tendered, but upon condition of the decree of 19th January, 1838, being set aside. We are therefore of opinion, that the Chancellor was right in his order of the 20th February, 1838.

We shall now proceed to examine the merits of the case.

107 *The complainant claims the rents and profits of the lands, in right of his wife, or in his own right, and the personal property, as the representative of his deceased wife, or in virtue of his administration on his daughter's estate.

We differ with the Chancellor, in his construction of the will of Henry Hatton, and believe that by its true construction, Mrs. Weems took an equitable estate tail, which, in this State, is converted into an estate in fee in the lands devised to her; and that in the personal property she took an absolute estate, and that the limitation over to

Henry Hatton, being after an indefinite failure of issue, is void. This construction of the will as regards the limitation over of the stock, plantation utensils, and kitchen furniture, is not denied; but it is insisted that the case of *Briscoe & Briscoe*, 6 G. & J. 232, is an authority to shew that he is entitled to the male negroes, and also the female negroes and their increase, and at all events, to the male negroes.

The Court, in their determination of *Briscoe & Briscoe*, refer to the case of 4 H. & J. 441, and 4 H. & McH. 393, and do not overrule them; but distinguish them from the case then before the Court, by the character of the subject-matter of the bequest. These latter cases are decisive of the right of Mrs. Weems to the negro women, and their children and increase. Did the testator mean a definite or indefinite failure of issue, as the event upon which the ultimate legatee was to take? These cases are decisive to shew, that where the subject of the bequest is a woman and her increase, that the testator meant an indefinite failure of issue. Such terms are used in this clause, and are decisive of the right of the first taker to the women and children; the men are contained in the same clause, and the same intention must be considered as applicable to them; for he clearly meant that all should go over on the same event, and not that one portion of the bequest should go over on definite, and the other on an indefinite failure of issue. He could not, and clearly did not, mean to separate them, as would be the case upon the construction contended for.

* If it be said that the intention in the clause of the will under consideration, by the bequest of men, was to indicate a bequest to the ultimate legatee, on a definite failure of issue, the intention is equally strong by the bequest of women and children to shew, that he meant an indefinite failure of issue. In such a case there would be no preponderating circumstance to show that the testator meant a definite failure of issue, and the limitation would, therefore, be considered as resting entirely on the legal extent and import of the words, "if she die without lawful issue, to heir the same;" and in that event, there could be no question but that the limitation would be too remote, and void. Such being the construction of the will, and the rights of the parties, it becomes our duty to inquire into the charges which should be made against the defendant, and the allowances which should be made to him for expenses of the trust, and for its management. 108

According to our laws, a guardian cannot encroach on the capital of his ward's estate, without the order of the Orphans' Court; nor can the real estate be diminished but by the approbation of the Court of Chancery; nor ought a trustee to encounter expenses impairing the principal of his *cestui que trust's* estate, without the approbation of a Court of Chancery, to which he should at all times appeal for his guidance and direction in the administration of his duties.

What expenses, however, he has necessarily encountered, and which can be clearly and satisfactorily seen by the Court, he ought to be allowed, as the Court, on application at the proper time, would have allowed them.

But in making such allowances, the Court must be careful that, in indemnifying the trustee, they do no injury to the *cestui que trust*. If the trustee has kept regular accounts of the expenses of the trust, so that they could be clearly seen and known, there could be no difficulty. But if he has mixed the property with his own, and kept no account of the products of the labor of the slaves, nor any account of the expenses of the clothing of the negroes, or of the clothing of his *cestui que trust*, then by his own conduct he has thrown over
109 * these matters an obscurity, which he might and ought to have avoided, and to prevent injustice being done to the *cestui que trust*. The consequences of such obscurity should be visited upon the trustee, and he cannot complain if those expenses are set down at the lowest estimate. Such has been the conduct of the trustee in this case. He has furnished us with not a single account of any kind or description, of the value of any clothing furnished the negroes of Mr. Weems. He has kept no account of the crops raised by the negroes, or of their hire; but has taken them himself, and worked them himself, with his own slaves, whereby real difficulty has arisen in doing justice to the parties. It appears that from the death of Mr. Hatton, up to the period when the accounts taken by the auditor are brought to a close, averaging the evidence given of the value of the labor of the slaves, and of the lands left by the testator, as estimated, and making the allowances claimed by him for compensation, alleged expenses for board and maintenance, it is manifest, that in a few years the trustee would consume the whole trust property. The principles upon which such a claim rests, cannot be well founded; and the claim cannot be sanctioned to the extent to which it goes, without overturning established rules. Had the defendant been a guardian, instead of a trustee, he could have only been allowed commission to the extent of 10 per cent. on the income of the estate. In the case of *Ringgold vs. Ringgold*, 1 H. & G. 11, the trustee was allowed commissions by way of compensation or indemnity, in analogy to executors, administrators and guardians, and if compensation be made to the trustee in this case, in analogy to the commissions allowed either guardians, executors, or administrators, it will be found, that he has been allowed in this case a sum much beyond that amount.

With regard to the expense of raising the negroes, it is a striking fact, that in 1834, when there were as many children, subjecting the trustee to expense, as at any other time, the receiver was subjected to no other expense on account of the children, than to the loss of
110 the hire of the mothers of the * children, and that the defendant agreed to take one of the women, who had the greatest

number of children, and her children, free of expense to the estate; yet notwithstanding this, when the property, during the same year was re-delivered to the defendant, allowances are made him in the account for the maintenance of the children. Eight witnesses are examined to prove, when in their judgment, a child ceases to be expensive to his master, and what would be a fair price for the maintenance of a child; and a rule for averaging testimony has been applied, and made the basis of the allowance to the trustee. This is a rule adopted by the Chancery Court, for attaining justice, where the record furnishes no other means of arriving with more certainty at the truth. But like every other rule, it must have exceptions, and cannot with propriety be capable of universal application. We think the case before us furnishes an exception. Suppose the trustee had for half the period of the trust, hired out the mothers, with their children, so as to be no expense to the estate, would it not be stronger evidence of what the maintenance of them would be for the residue of the time, than the opinions and conjectures of witnesses, who vary in such opinions, of the annual expense of each negro, from five to twenty dollars. We think in such a case, the rule of average should be disregarded, and so we think, the fact that the receiver has been able, at so little expense, to take care of these children, is better proof than can be derived by the adoption of the general rule, and the more especially, as the defendant, by taking the most burthensome family on such terms, has admitted virtually the correctness of these views.

So too with regard to the board and clothing of the *cestui que trust*. We think we perceive in the record, a better guide than the rule of average. Ladies in the neighborhood have been boarded for one hundred dollars, and clothed for one hundred dollars, and indeed for a less sum; and a witness, whose occupation is that of taking boarders, proves that he could board and lodge a lady for one hundred and twelve dollars. Evidence of this character, on the supposition that credit is to be * attached to the witnesses, is a better guide to truth and justice, than the opinions of those, whose occupa- **111** tions or experience do not give them practical knowledge of the value of boarding. We shall, however, make a higher allowance for Mrs. Weems' board and maintenance, than the above remarks would seem to indicate, as it is fully proved that her attire was more costly than was common. We think, in this view of the subject, and considering that Mrs. Weems was his sister, and it is proved that the board of a sister would not be so valuable as of a stranger, we think we shall make a sufficient allowance to the defendant, by directing the same to be credited to him at two hundred and fifty dollars per annum.

From the considerations above stated, we shall allow annually for all expenses of the trust, the difference between the amount of Mrs. Weems' board, and the whole income of the estate annually; or in

other words, the sum left of the annual income of the estate, both real and personal, after deducting from the same, the amount of the board, the account will thus be taken to the marriage of Mrs. Weems; after which the board must cease, as a credit to the defendant; and he will continue to be allowed annually, out of the income, the same amount for expenses, as were allowed before the marriage of Mrs. Weems.

The defendant, as a compensation or indemnity, for his care of the estate, must be allowed commissions, according to the rule heretofore laid down by this Court, in *Ringgold vs. Ringgold*, 1 H. & G. 11. Under ordinary circumstances, we should have been disposed only to allow him the lowest commission, but it has been a trust of long duration, and we will therefore allow him seven and one-half per cent. commission on the income of the real estate; and seven and one-half commission on the income of the personal estate, and the value of the personal estate as it came to his hands. Some of the negroes have died. Their annual value must be deducted from the charges against him. Louisa, from the marriage of Mrs. Weems, and Henley, Lantz and Romeo, from two months prior to their respective deaths.

112 Credit must also be allowed for * Frank, and for Hanson's services, from the periods when the trustee lost their services according to the account of the auditor, as stated in the record.

We think the auditor has rightly charged the defendant with the stock and forming utensils, under the circumstances of the case, and he has rightly assumed, that they have been converted by the trustee.

The only remaining question for consideration, is the right of the complainant to sue for the property of his wife, in his own name. We think this right is conferred upon him expressly, by the Act of 1798, chapter 101; just as if he had administered. Whether he be entitled, by the laws of Tennessee, to this property, it is not important to inquire; if he should not be, he would then recover, as trustee, for the benefit of whomsoever might be interested.

According to the above views, it would seem to be unnecessary to say anything with regard to the admissibility of the evidence of the letters of administration, which are referred to in the supplemental bill of revivor; because we believe that the whole personal property, and the rents and profits of the land, can be recovered by the husband, as we think he acquired rights over both, by marrying his wife, and by having issue born alive. The Tennessee commission establishes the fact, that Mrs. Weems had a child born alive. We shall, therefore, decree an account to be taken to this time by the auditor, and shall decree the payment over to the complainant, of the balance, if any shall be found due, and the delivering over of the negroes and slaves who are now in being, and in possession of the defendant.

As each party has, to some extent succeeded, and the decree will be modified and reformed, we shall decree that each party shall pay his own costs in this Court.

In conformity with this opinion, this Court directed the auditor of the Court of Chancery to state further accounts between the parties, and on the 2nd March, 1842, decreed: 1st. That there was error in that part of the Chancellor's decree of the 2nd October, 1840, which ratified the auditor's report * of the 2nd September previous, and reversed the same, so far as it ratified said report, with **113** costs in the Court of Chancery to W. L. Weems. 2nd. That the auditor's report, made to this Court, be ratified, and that H. D. Hatton pay, &c.; and 3rd. That the said H. D. H. surrender and deliver up to the complainant W. L. W., such and so many of the negroes mentioned in the decree passed by the Chancellor in this cause, on the 19th January, 1838, with the increase of the females, as may now be living. 4th. That the cause be remanded to Chancery; that the necessary orders may be there passed, for the purpose of compelling a compliance with this decree, so far as it relates to the delivery of the property hereby decreed to be delivered; that the part of this decree which relates to the payment of the money, may be enforced by process from this Court, and that each party pay his own costs in this Court.

Decree reversed in part, and cause remanded.

WILLIAM G. PENN vs. N. BREWER, Administrator of JOHN BREWER and JAMES BOYLE.—December, 1841.

A bill in the County Court, seeking its interposition upon the same grounds previously decreed upon in the Court of Chancery, at the suit of the same complainant, without communicating the proceedings which had taken place in Chancery, is a contempt offered to the County Court, and an abuse of its privileges, which merit, and might be visited with, severe reprehension.

A trustee appointed by the Court of Chancery, is an officer of that Court, acting under its direction and authority; and so far as concerns matters of equitable jurisdiction, as to what he does, or ought to do, in discharge of his duties, is alone responsible to that Court. (a)

APPEAL from the equity side of Montgomery County Court. On the 11th February, 1829, the appellant filed his bill, upon which was an order directing an injunction and subpoena to issue in the usual manner, which was done accordingly; and returned by the sheriff, served and summoned. The defendants appeared and filed their answers. Sometime in the year 1836, the bill and all the papers

(a) Cited in *Sewall vs. Costigan*, 1 Md. Ch. 210.

114 belonging to the cause * were lost. On the 9th January, 1837, on motion of the complainant, and by consent of the defendants, the Court granted permission to file a bill, exhibits, and injunction. The bill alleged that a judgment was rendered against the said William G. Penn in Montgomery County Court at November Term, 1822, in favor of John Brewer; that John Brewer had been appointed a trustee to sell the real estate of Charles Penn, Senior, and made sales to the appellant, who paid to the said John Brewer, and by his directions to the heirs of Charles Penn, Senior, large sums of money; that John Brewer died in 1827; that Nicholas Brewer is his administrator; and that James Boyle was the attorney of the plaintiff in the proceedings to affect Charles Penn, Senior's land; and that he had paid said Boyle in full for his purchase. The bill then alleged that *fi. fa.* had been issued on the judgment against him, and his property levied upon, and taken to satisfy the judgment against him. Prayer for an injunction, subpoena, and relief.

The answer of Nicholas Brewer, as administrator, alleged that he did not know what payments had been made by the appellant Penn; that after the death of his intestate, James Boyle, Esquire, was appointed trustee in his place; that he knows nothing of any settlement between Boyle and Penn.

The answer of James Boyle denied that his predecessor ever authorized the appellant to pay the heirs of Charles Penn, Senior, their proportions of his estate; that if he did so, he exceeded his authority; that said sale of Penn's land was under the decree of the Court of Chancery; that John Brewer was appointed trustee by that Court, who had to sue William G. Penn for his purchase money, for which purpose this respondent was the attorney of said trustee; that respondent is the successor of the said John Brewer in the said trust; that this defendant has not received the alleged payments from the said William G. Penn.

This defendant further states, that on the 24th March, 1812, a decree was passed by the Court of Chancery that the real estate of Charles Penn, Senior, and Nathan Waters should be sold to raise the sum of, &c., which decree was affirmed upon * appeal; 115 that the said John Brewer was appointed trustee; that the land was decreed to be sold as the land of Nathan Waters, and was so sold as his, because insufficient to pay the one-half of the said debt; and that the Chancellor on or about the 9th June, 1824, passed a decree that the trustee should not pay the representatives of Charles Penn any further sums of money, without the further order of the Court, or to any other person claiming to represent them, or to allow any other credits on account of any receipts to the said representatives. The said trustee John Brewer on being compelled to sue said complainant, employed this defendant as his attorney, who brought suit against the complainant, and obtained a judgment

as stated in the said bill of complaint. The answer then proceeded to set forth the various payments with their respective dates and amounts, made by the said complainant, as appeared by the report of the auditor of the Court of Chancery, dated 25th April, 1826, and which report has been confirmed. That afterwards, on the petition of John Hoyer, &c., to wit, on the 28th February, 1828, it was ordered, &c., that the several receipts or assignments of the respective representatives of the late Charles Penn, Senior, should be allowed in favor of the assignee, the complainant W. G. P. claiming under them, and that the trustee should apply the proceeds as directed by the order confirming the auditor's report, made on the 29th January, 1823; from which an appeal was had, and at June Term, 1828, the said decree of the 28th February, 1825, was reversed and the cause remanded to Chancery. This defendant further states, that the said John Brewer is dead, and on the 4th August, 1828, this defendant was appointed trustee by the Court of Chancery, to carry the decree under which the said John was appointed trustee, into effect, and was such trustee at the time the injunction in this case was first granted and issued; that he never received any money from the complainant as trustee, and that the sum of \$500 claimed by the complainant, has never been paid. This defendant further answering says, that on the 14th August, 1828, the complainant filed in the Court of Chancery his petition, setting forth the said *decree of the Court of Appeals, and praying that the defendant as trustee, **116** should be restrained from proceeding against him until the matter of the said petition should be heard; that an account should be taken of the moneys paid by him to the trustee, and to the representatives of Charles Penn, Senior, and allowance made him for all such payments, which petition the Chancellor on the 26th January, 1829, after mature deliberation dismissed, as to grant it would be in effect to reverse the decree of the Court of Appeals; that this complainant Penn not being satisfied with all those reversals, applied to the Honorable Court for relief, and carefully concealing the above facts, obtained an injunction. He therefore submits that the said W. G. P. is in contempt, &c.

With this answer exhibits of the judicial proceedings were filed by the respondent, and after various proceedings, the County Court, [DORSEY, C. J., and WILKINSON, A. J.] at November Term, 1839, decreed as follows:

The complainant in this cause having in the first instance applied to the Court of Chancery for relief as to most of the matters of equity, which form the basis of his present application, and his bill or petition being there dismissed upon its merits, his filing a bill in this Court, seeking its interposition upon the same grounds, without communicating the proceedings which had taken place in Chancery, is a contempt offered to this Court, and an abuse of its privileges,

which merit, and might be visited with severe reprehension. If the complainant felt himself aggrieved by the decision of the Chancellor, his remedy was by appeal to the appropriate tribunal, not by concealing what had been done, to seek the same relief which had been denied him in Chancery, at the hands of a Court of co-ordinate jurisdiction. But there is another objection to the complainant's appeal to this Court for relief, which meets the whole equity of his bill so far as jurisdiction is concerned. The defendant, whose acts are sought to be impeached, whose conduct is attempted to be controlled, is an officer of the Court of Chancery, acting under its direction and authority, and in that tribunal must be held responsible for what he does in the discharge of his duties as far as concerns matters of equitable jurisdiction. For his official conduct he is there amenable. Whether he has acted according to its orders and rules prescribed for his governance; what disposition he has made, or should make of the funds confined to his charge, as to all equitable proceeding in relation thereto, must be determined primarily in the Chancery Court. To permit a Court of equity of co-ordinate jurisdiction to interfere in such matters, would lead to a conflict of jurisdiction, productive of ruinous consequences. The complainant's bill must therefore be dismissed.

From this decree the complainant appealed, and his appeal was argued before ARCHER, CHAMBERS, and SPENCE, JJ.

A. C. Magruder, for the appellant. *Boyle*, (*D. A. G.*), for the appellee.

SPENCE, J. stated, that this Court concurs in the decision of the County Court, and in the reasons assigned by that tribunal for dismissing the bill.

Decree affirmed.

THE TAX CASES UNDER THE ACT OF MARCH, 1841, CHAP. 23. December, 1841.

The State has the power to exempt from taxation particular items of property, to the extent proposed in the Act of March, 1841, chap. 23; as also in the charters of the Baltimore and Susquehanna Railroad Company, Act of 1827, chap. 172, sec. 20, and the Philadelphia, Wilmington and Baltimore Railroad Company, Act of 1831, chap. 296, sec. 19.

The 7th and 11th sections of the Act of 1821, chap. 131, are to be regarded as securing the banks from further tax or charge for their franchise or banking privilege, but not as exempting the property belonging to such banks, or the shares of stock therein held by individuals, from taxation.

The property of a bank being represented by the shares of stock therein, both cannot be taxed; and therefore, when the tax is imposed on the

stock in the hands of shareholders, the property of the bank, real or personal, cannot also be taxed. (a)

The stock of the banks in Baltimore in the hands of shareholders was rightfully taxed, but the Appeal Tax Court erred in taxing the real and personal property of the same banks.

*The banks in the City of Baltimore, incorporated before and after the year 1821, are in the same condition, as to the exemption of the banking privilege from taxation—at all events, the Act of 1885, chap. 142, must have relieved the case of all doubt as to the banks claiming under that law. **118**

Non-residents of the State are liable to the tax in respect of stock held in the banks of this State, as well as residents here. (b)

It also results, that as the stock is the representative of the property of a company, the exemption of the one must be considered as the exemption of both, unless the exemption be made on the ground of selection, to show which is intended to be taxed to the exclusion of the other.

In the case of The Baltimore and Susquehanna Railroad Company, Act of 1827, chap. 72, sec. 20, the stock is expressly exempted, and the whole object would be defeated by taxing the property; the mortgage executed to the State, cannot exempt the property mortgaged from taxation in the hands of the company mortgagor.

In the case of the Philadelphia, Wilmington and Baltimore Railroad Company, the Legislature, by the same Act (1831, chap. 296, sec. 19.) which exempts the stock, reserves the right to tax the fixed and permanent works of the company, the tax on the property thus excepted from the exemption is proper on the ground of selection.

The tax in that case has been imposed according to the exception; the bed of the road, the rails, buildings and steamboat being within it; the principle of valuation adopted is proper; taxing the buildings, steamboats and rails, as of the value they bear, irrespective of their being portions of a railroad, and taxing the land as land, and not as of increased value by reason of its being used as a railroad.

The charitable and literary institutions excepted in the Act of 1841, are properly considered as exempted.

(a) Approved in *Gordon vs. Baltimore*, 5 Gill, 236; *County Com'rs vs. Bank*, 48 Md. 119. In the latter case the Court said that the objection that the stock of a bank represents its whole property, and to tax both would be double taxation, was not a new question in this State. "In the *Tax Cases*, 12 G. & J. 117, this question was fully argued by able counsel; no formal opinion was delivered by the Court, but in the *syllabus* setting out the points decided, it is distinctly stated, as the judgment of the Court, that 'the property of a bank being represented,' &c. "By an examination of the facts of the case in reference to which this proposition is stated, it clearly appears that this was the only question presented." See also, *County Com'rs vs. R. R. Co.* 47 Md. 611. But the State has the power to tax stocks, bonds, and certificates of debt of other States, and of corporations created by them, (although exempted from taxation by such other States,) when held by residents of this State. And the same power of taxation extends to the stocks, bonds and certificates of debt of other States, and of corporations created by them, when held by residents of this State, although such stocks, &c. may also be taxed by such other States. *Tax Court vs. Gill*, 50 Md. 896.

(b) Cited in *Tax Court vs. Patterson*, 50 Md. 868.

The exemption of the Act of March, 1841, chap. 23, also protects from taxation all "houses of public worship and burying grounds," but not bank stock or other property held by or in trust for religious institutions, whether incorporated or otherwise.

Shares in the hands of stockholders in the Insurance Companies being taxed, the stock held by the companies as part of their property cannot also be taxed.

A bank, as in the case of The Farmers and Merchants Bank of Baltimore, being the holder of its capital stock, is not liable to be taxed thereupon.

A mortgage in the hands of the mortgagee is liable to be taxed as an item of his property—though all his other property, a part of which was mortgaged, is also taxed, and he cannot claim to deduct the sum he owes, from the sum due to him on mortgage. (c)

A literary institution whose property is exempt from taxation, confessing a judgment to enable the plaintiff in the judgment to borrow money for it, does not exempt such judgment in the hands of such plaintiff from being taxed. Protection to the institution, does not protect those who deal with it.

119 * APPEALS in the tax causes under the Act of March Session, 1841, ch. 23.

By the Act of 1841, chap. 23, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State.

It was enacted by the first section, "that all real and personal property in this State, all chattels real and personal, all goods, wares and merchandises, and other stock in trade at home, or not permanently located elsewhere; the interest or proportion in all ships and other vessels, whether in or out of port owned by persons resident of this State; all debts secured by or due on judgment, decree, mortgage bond, bill of exchange, promissory note from insolvent debtors, (except debts due for goods sold and delivered after the passage of this Act, and bank notes,) all stocks or shares owned by residents of this State in any bank, institution or company incorporated in other State or territory; all debts due to residents of this State by solvent debtors residing out of this State, except debts due for goods sold and delivered after the passage of this Act; all investments in securities or stocks of other States, made or held by residents of this State; all public loans and stocks whatsoever (except those created or issued by the United States,) owned or held by residents of this State; all stocks or shares in any bank, institution or company incorporated by this State, and all other property of every description whatsoever, shall be valued agreeably to the directions of this Act, and shall be chargeable according to such valuation with the public assessment; Provided, that nothing herein contained, shall be construed to authorize the assessment of any tax upon—

(c) Cited in *Tax Court vs. Patterson*, 50 Md. 368. Cf. *Emory vs. State*, 41 Md. 88; *Tax Court vs. Rice*, 50 Md. 802.

1. Property belonging to the United States, to this State, or to any county or city in this State.

2. Nor to any incorporated, literary or charitable institution, nor county schools.

3. Nor houses for public worship or burying grounds.

4. Nor the crop and produce of lands in the hands of the producer or his, her, or their agent.

* 5. Nor provisions for the use and consumption of the person to whom the same shall belong, or his or her family. **120**

6. Nor plantation utensils.

7. Nor the working tools of mechanics and manufacturers, moved or worked by hand, and the produce of their respective occupations whilst in their possession, or the possession of their agents.

8. Nor wearing apparel.

9. Nor fish, at the time fishermen may be employed in catching, salting and packing the same, or while they remain in their possession, or that of their agents, unsold.

10. Nor to household manufactures.

11. Nor judgments, bonds, mortgages, promissory notes or other securities, belonging to any bank or other incorporated institution, the capital stock whereof is made subject to taxation by the provisions of this Act.

12. Nor to any goods, wares, merchandises or other property belonging to persons not residents of this State, in the hands of factors in this State, for sale.

By the 33d section of this Act, it was declared, that upon the argument of any appeal under this Act, "neither party shall be permitted to discuss any point involving merely a question of value or of regularity, or any other question of fact merely which may appear to have been acted on by the Levy Court, commissioners or appeal tax Court, as the case may be; but the proper subject-matter of such appeal, shall be the right of the General Assembly to subject to valuation and assessment for the support of government, property which is hereby made subject thereto, and the right of the General Assembly to exempt from valuation and assessment, property which is hereby exempted, and to make such provision for such valuation, assessment and exemption as is herein prescribed, and the conformity or otherwise of valuation, decision or other proceeding objected against, with the provisions of this Act."

Under this Act, the appeal tax Court of the City of Baltimore proceeded to value and assess the capital stock of the Union Bank of Maryland, and also to value and assess its real * property in this State, including the banking house of the said bank, **121** and also its furniture and fixtures in the banking house. This bank held as proprietor, various houses and lots other than its banking house. It appeared from the record, that the stock of the said bank belonged in part to various persons not residents of the State of

Maryland, but residents of other parts of the United States, and of foreign countries.

That another portion of said stock belonged to various citizens of this State, and to certain incorporated literary and charitable institutions, viz: the Baltimore Female Orphan Asylum; the Benevolent Society of Baltimore; the Marine Charitable Society; the Medical and Chirurgical Faculty of Maryland; the Baltimore General Dispensary, and the Saint Andrew's Society. From such assessments all the stockholders respectively, and the said Union Bank of Maryland, appealed to this Court.

It also appeared, that certain stock held by the Baltimore Insurance Company, in the Mechanics Bank of Baltimore; in the Chesapeake Bank; in the Union Bank of Maryland; in the Merchants Bank of Baltimore:

That certain stock held by the Baltimore Fire Insurance Company, in the Mechanics Bank of Baltimore; in the Farmers and Merchants Bank; in the Bank of Baltimore; in the Union Bank of Maryland; in the Merchants Bank, and in the Farmers and Planters Bank:

That certain stock held by the Chesapeake Bank of Baltimore, in the Mechanics Bank of Baltimore; in the Bank of Baltimore; and the Citizens Bank of Maryland; and in the Commercial and Farmers Bank of Maryland; in the Union Bank of Maryland; in the Merchants Bank:

That certain stock held by the Firemen's Insurance Company.

The Maryland Insurance Company.

The Merchants Fire Insurance Company.

The Neptune Insurance Company.

The Patapsco Bank of Maryland.

The American Insurance Company.

* The Farmers and Planters Bank.

122 The Farmers and Merchants Bank.

The General Insurance Company.

The Maryland Insurance Company.

The Merchants Bank of Baltimore.

The Baltimore and Susquehanna Railroad Company.

The Neptune Insurance Company.

The Powhatan Manufacturing Company.

The Western Bank.

The Baltimore Life Insurance Company.

The Union Insurance Company, and

The American Life Insurance Company.

In the Mechanics Bank of Baltimore; the Farmers and Merchants Bank; the Marine Bank; the Chesapeake Bank; the Bank of Baltimore; the Citizens Bank of Baltimore; the Commercial and Farmers Bank; the Franklin Bank of Baltimore; the Union Bank of Maryland; the Merchants Bank; the Western Bank, and the Farmers

and Planters Bank. The Farmers and Merchants Bank being holders of 1711 shares of its own stock :

Was valued and refused to be taxed by the Appeal Tax Court aforesaid, and from which refusal, the State in the name of the said Court, appealed to this Court.

It further appeared by the record in these causes, that George M. Gill was assessed upon mortgages (an account of which he had rendered,) to amount of \$7,000, from which he claimed to be exempt from taxation, because he owed a larger sum on mortgage, and that under the Bill of Rights he could only be taxed upon his actual worth, while in fact he was taxed upon all his real and personal property, including mortgages to him, without deduction for the sum due by him on mortgage, and from which he appealed to this Court.

It also appeared from the same records, that Charles F. Mayer was assessed on debts due to him secured by mortgage of real property, and on bank stocks held by him, he contending that his mortgage claim was not taxable, the mortgagor being in respect of the mortgaged estate alone taxable. From this judgment of the Appeal Tax Court of the City of Baltimore, he appealed to this Court.

* It also appeared as aforesaid, that the Washington College was assessed, on the college lot, buildings, and furniture, and that Dr. Samuel K. Jennings, who had a judgment against the said college, was also assessed. It was admitted that Dr. Jennings had advanced for the erection and furniture of the college about eleven thousand dollars, and to enable him to borrow money on the property of the institution, the professors of the college confessed a judgment to him, and he contended that the property being taxed, is as much, as in justice ought to be claimed, the judgment and the property on which it is dependent being identical. From this judgment the college and Dr. Jennings both appealed. **123**

It also appeared as aforesaid, that the Savings Bank of Baltimore was in possession of certain bank stocks and other securities, viz: stocks in banks incorporated by this State, turnpike road stock and mortgages, which were assessed—the Savings Bank appealed.

It further appeared, that Daniel Adler and various other stockholders of the American Life Insurance and Trust Company, (an institution incorporated by the State of Maryland,) not residents in Maryland, were assessed upon their capital stock therein, from which they severally appealed.

It also appeared, that the Philadelphia, Wilmington and Baltimore Railroad Company, were assessed by the Commissioners of Harford County, viz: To the several parcels or tracts of land held and occupied by the said company from the Gunpowder Falls to the Susquehanna River, containing together 200 acres, valued at \$2,000. To the houses and other improvements on the road, and at Havre de Grace, valued at \$15,000. The railroad track within the limits of

Harford County, valued at \$95,000. The steam ferry boat at Havre de Grace, valued at \$15,000; in all \$127,000, on which the tax was levied under the Act of 1841. The company appealed from said decision.

The resident and non-resident stockholders of the Farmers and Merchants Bank of Baltimore, and the said bank as in the case of the Union Bank of Maryland, were assessed, and appealed from the same to this Court.

124 * Similar appeals were taken by all the stockholders in the cases of

The Mechanics Bank of Baltimore.

The Bank of Baltimore.

The Marine Bank of Baltimore.

The Commercial and Farmers Bank of Baltimore.

The Citizens Bank of Baltimore.

The Merchants Bank of Baltimore.

The Farmers and Planters Bank of Baltimore.

The Western Bank, and

The Chesapeake Bank; to this Court.

These appeals were argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

In their argument, the Bill of Rights of Maryland and various Acts of Assembly were referred to, viz:

13th Section, Bill of Rights.—That the levying taxes by the poll is grievous and oppressive, and ought to be abolished; that paupers ought not to be assessed for the support of government; but every other person in the State ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property within this State; yet fines, duties or taxes may properly and justly be imposed or laid with a political view, for the good government and benefit of the community.

By the Act of 1821, ch. 131, entitled, an Act to incorporate a company to make a turnpike road from Boonsborough to Hagerstown, and for the extension of the charters of the several banks in the City of Baltimore, and for other purposes; it was recited in the preamble to be the interest of the State, that a turnpike road leading from Boonsborough to Hagerstown, in Washington County, should be made, and it is represented to the Legislature that the banks hereafter mentioned are willing to make the same, if an extension of their several charters be granted to them as they were heretofore extended. Therefore, Be it enacted, &c., (after making provision for building the turnpike.)

125 7th Section. That on, &c., and annually thereafter, the * president, directors and company of the aforesaid banks, shall pay to the Treasurer of the Western Shore of Maryland, the sum of twenty cents on every hundred dollars of the capital stock of

each bank actually paid in, or which may hereafter be paid in, and any of the said banks neglecting to make such payment for the space of six months after the same shall have become payable, shall thereby forfeit their charters, which shall then be considered null and void, and no longer continue under the provisions of this Act.

8th section. That the charters of such of the aforesaid banks as comply with the provisions and conditions of this Act, shall be renewed and continued until the year 1845, &c.

9th section appropriated all sums of money received under this Act, to be a fund for the establishment of free schools.

10th section pledged such inviolably for the establishment of a general system of free schools throughout the State.

11th section enacted, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this Act, the faith of the State is hereby pledged not to impose any further tax or burthen upon them during the continuance of their charters under this Act.

Act of 1831, chap. 296, sec. 19. Extract from the charter of the Delaware and Maryland Railroad Company, made part of the charter of the Philadelphia, Wilmington and Baltimore Railroad Company. "And the shares of the capital stock of said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen, by the State's assenting to this law, except upon that portion of the fixed works of said company which lie within the State of Maryland, and that any tax which shall hereafter be levied upon said section, shall not exceed the rate of any general tax which may at the same time be imposed upon similar real or personal property of this State for State purposes."

By the Act of 1834, ch. 274, the Acts incorporating the several banks in the City of Baltimore, whose charters were extended by the Act of December Session, 1821, chap. 135, were * upon their respective compliance with the provisions of this Act, **126** declared to be severally extended to wit, as follows, &c.

2nd section. That in order to their (the said banks,) respective enjoyment of the benefit of this Act, the said corporations shall, on the first day of January in the year 1836, and annually thereafter, respectively pay to the Treasurer of the Western Shore, upon their respective capitals, now or that shall hereafter be paid in, the sum of twenty cents upon every hundred dollars of said capitals respectively; and shall also pay to the Treasurer in two equal yearly instalments, computed from the passage of this Act, their respective proportional parts according to and in the combined ratio of their respective capitals paid in, and of the time for which their charters are hereby respectively continued beyond the 1st day of January, 1846, the sum of \$75,000, the aggregate of the assessments hereby fixed upon the capitals of the said corporations, it being however

understood, that said charge of twenty cents upon said capital is not additional to the charge as prescribed by the 7th section of the Act of 1821, chap. 131, as to the terms of said Act.

3rd section. If any of said corporations shall fail to pay said charge of twenty cents on every hundred dollars, for the space of six months after the same shall be payable as aforesaid, this Act as to the corporations so in default, shall be null and void.

4th section. Same as 3rd section in relation to non-payment of instalments under 2nd section.

Section 5. *And be it enacted.* That if any of said corporations shall, by or in any proceedings whatsoever, at law or in equity, attempt to call in question or to dispute, or to procure to be so called in question or disputed, the validity in any respect, or to any extent, of any Acts that have been or may be passed, either during the present session or during any future session of the Legislature of Maryland, incorporating any bank within the limits of the City of Baltimore, or to attempt to restrain or in anywise interfere with the exercise of the corporate powers that shall be purported to be granted by any * such Act of incorporation, then this Act as to the said incorporation so attempting or procuring, shall be null and void.

Act of 1835, ch. 142, entitled, An Act relating to certain banks in the City of Baltimore:

WHEREAS, by the eleventh section of an Act of Assembly, passed at December Session in the year eighteen hundred and twenty-one, chapter one hundred and thirty-one, the faith of the State was pledged to certain banks in the City of Baltimore, upon certain terms and conditions therein specified, not to impose any further tax or burthen upon them during the continuance of their charters under that Act; and whereas, it is equitable that the banks subsequently chartered by the State of Maryland, should stand on equal footing with those banks—Therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the faith of the State be, and it is hereby pledged, to impose no further or other tax or burthen upon any banks incorporated since the year eighteen hundred and twenty-one; or which may be hereafter incorporated, than such as may be expressed in their respective charters, and such as without violation of the pledge aforesaid, may be imposed on the banks which complied with the provisions of the aforesaid Act of eighteen hundred and twenty-one.

SEC. 2. *And be it enacted,* That the municipal authorities of the City of Baltimore, shall not have power to impose or collect from any bank incorporated after the passage of the said Act, or which may be hereafter incorporated, or upon the stock held therein, any tax which they may not lawfully, and shall not equally impose upon and collect from the banks, or upon the stock in the banks which

have complied as aforesaid, with the terms and conditions of the said Act of Assembly.

SEC. 3. *And be it enacted*, That in the said Act of eighteen hundred and twenty-one, it was not, nor is it the intention of the General Assembly of Maryland, to exempt from taxation and equitable contribution, to the common burthens for State purposes, the property, stock or dividends severally held in or derived from any bank in this State, by any person or persons whatever, but that the true intent and meaning of the * pledge given by the said Act of Assembly, was to limit the taxation upon the franchises only **128** by the banks therein mentioned.

In the Court of Appeals the parties entered into the following agreement, to wit:

It is agreed that the appellant banks, to wit:—The Union Bank of Maryland, The Bank of Baltimore, The Mechanics Bank of Baltimore, The Commercial and Farmers Bank of Baltimore, The Marine Bank of Baltimore, and The Farmers and Merchants Bank of Baltimore, commonly called the old Banks, were chartered previous to the year 1821; and that the new Banks, to wit:—The Merchants Bank of Baltimore, The Farmers and Planters Bank of Baltimore, the Citizens Bank of Baltimore, and the Western Bank of Baltimore, were chartered since the year 1830, the respective periods of the incorporation of all the foregoing Banks appearing by reference to their charters.

It is admitted that the old Banks have duly accepted and complied with the terms and conditions of the Act of 1821, chap. 131, the manner of which acceptance appears by the paper marked A herewith filed; and have also accepted and complied with the provisions of the Act of 1834, chap. 274; and it is also admitted, that taxes have always since the incorporation of said Banks been levied and assessed upon their real and personal property, in all the cities and counties of this State, in the same manner as upon property of the same kind belonging to individuals, and that said taxes have always been paid by said Banks, up to this time. And it is further admitted, that said Banks did not at the time of the enactment of the Act of 1841, chap. 23, nor have they at any time since, paid or redeemed their notes or other obligations in specie.

J. MEREDITH,

G. L. DULANY, for appellants.

B. C. HOWARD,

A. CONSTABLE,

I. N. STEELE, for appellees.

* *Dulany* on the part of the appellant Banks insisted—1. **129**
That the old banks having accepted of, and complied with the terms and conditions of the Act of 1821, chap. 131, a contract was created by the 11th section thereof on the part of the State “not to impose any further tax or burthen” upon said banks during the con-

tinuance of their charters under the 8th section of said Act, and that this exemption from taxation extends to all the property of said banks, real and personal.

The Act of 1841 is void as respects the old banks; it is in direct opposition to a contract entered into by the State with them. The State had agreed to impose no further burthens on them. She might lawfully make this contract, and for a consideration exempt them from taxation, and she cannot repeal the grant. *New Jersey vs. Wilson*, 7 Cranch, 164; *Ib.* 2 Peter Con. Rep. 457.

A partial release of the taxing power may be exerted for value. *Providence Bank vs. Billings & Pittman*, 4 Peter, 561.

The 11th section of the Act of 1821 is a contract, and valuable to the State. A charter is a contract; a franchise property. *Canal Co. vs. Railroad Co.* 4 G. & J. 1; *Regents of University of Maryland vs. Williams*, 9 G. & J. 365.

The banks had the power to contract with the State; they had a capacity to contract. What right does the contract bestow? What are the extent of its exemptions? The banks are entitled to the exemption. Its language is clear, brief and comprehensive. It is perfect and absolute in its terms. No further tax or burthen is to be imposed. The Act of 1841 is a direct violation of the Act of 1821. Light and darkness are not more opposed—one bestows an immunity, the other takes it away. It is in fact so clear, that it is difficult to make a question on it. It is said this exemption only applies to the franchise, but those words are not found in the law. The truth lays on the surface, and need not be burrowed for. For all rules of construction are out of this case; the words of the Act are plain, unambiguous and of easy meaning. *Dwarris on Stat.* 40, 47.

130 The Act of 1841 exempts the bank from further tax. The Act of 1841 imposes a tax of 20 cents in the one hundred dollars. The exemption is general—no limitation, and the words must have some effect. After a franchise granted, it could not be taxed; once given, it cannot be recalled; but the power to tax is the power to destroy.

In this State no property is liable to taxation; persons are liable to be taxed in respect of property. 13th section of *Maryland Bill of Rights*. Property is referred to, to graduate the tax laid on the individual. Immunity from tax is itself a franchise and a personal privilege. The recitals of the preamble of the Act of 1821, shows that it was merely to extend several charters. The preamble does not disclose the entire design of the contracting parties. The school fund and the exemption from further tax are not mentioned in it. The old banks are clear of the taxing power until 1845; and the Act of 1841 is void as to them. Then who constitute the banks? Who the contracting parties to this agreement with the State? Who is exempted from burthens *in futuro*? The stockholders. A bank is neither separate from, exclusive, nor independent of its stockholders.

A contract with the banks is necessarily one with their stockholders. The consideration is paid by them out of their funds, which entitles them to the exemption. The exemption under the Act of 1821, is a personal franchise conferred on the contracting parties. It relates to the whole body of stockholders. The banks were required to accept the Act of 1821, and until accepted by the proper party, no extension of their charters. Then who made the act of acceptance? Was it the banks as distinct from the stockholders? No, it was the stockholders as distinct from the bank. It was an acceptance by the assembled stockholders, which was acceptance by the banks. The Legislature has determined that the terms, bank and stockholders, as to this power, are identical. Where there is deliberate purpose to make a grant, it is construed most favorably for the grantee. 4 G. & J. A grant to a body is to all the members of it. *Providence Bank vs. Billings & Pittman*, 4 Peters, 562.

* A tax upon the stock is a tax upon the social character. I maintain the banks cannot be taxed *eo nomine*, nor the stockholders, which are the bank. **131**

2. That the 1st and 45th sections of the assessment Act of 1841, chap. 23, does impose upon the old banks, a further tax and burthen, in violation of the said contract, and is therefore void as against the provisions of the Constitution of the United States.

3. That if the said assessment law, so far as it imposes a further tax upon the old banks, should be declared void, for the reason aforesaid, then the said Act of 1841 is equally invalid, so far as it imposes an additional tax upon the new banks, as it thereby deprives the new banks of the immunity from further taxation, granted to them by the 1st section of the Act of 1835, chap. 142—which immunity from further taxation is itself a franchise, and when once granted cannot again be taken away. But if it could, the appellants will further contend, that according to the true construction of the said Acts of 1841 and 1835, it was not the design of the Legislature to burthen the new banks with any additional tax, which would not equally apply to the old ones.

The 3rd section of the Act of 1835, is a legislative declaration after the contract made. That Act is nugatory as to the Act of 1821. No interpretation can be given by the Legislature to the Act of 1821. That is a judicial power. The Act of 1835 does not depart from the equity of 1821. It was not the design to tax the new banks—those erected since 1821—if those prior could not also be taxed. *Canal Co. vs. Railroad Co.* 4 G. & J. 5.

4. That the imposition of a new tax of 20 cents on every one hundred dollars worth of property, upon both the new and old banks, in addition to the tax heretofore paid by them, is unequal and oppressive, and in violation of the 13th section of the Bill of Rights.

This would make 40 cents in the hundred dollars to stockholders, while the rest of the community pay 20 cents. A double tax is unequal and unjust.

132 * 5. That the taxation of the stock of foreign or non-resident stockholders of said banks, is against the Bill of Rights, and therefore void.

This tax is against the 13th section of the Bill of Rights of Maryland *Osborn vs. Inhabitants of Danvers*, 6 Pick. 100.

Both the person and property must be in the State before the taxing power attaches. *Great Barrington vs. County Commissioners of Berkshire*, 16 Pick. 572.

I. N. Steele, Deputy Attorney-General, *Constable and Howard*, for the Appeal Tax Court as appellee, contended—

1. That at the time of passing the general assessment law of 1841, there was no contract existing between the State and the banks or any of them, or the stockholders therein, or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said Act of 1841.

2. That the contract between the State and the old banks, if there be any contract, extends only to an exemption from further "taxes or burthens" of the corporate privileges of banking; and does not exempt the property, either real or personal of said banks, or the individual stockholders therein.

The Act of 1821 is a contract; yet we construe it as a law; or we construe it as a will; we look to the law or the will for the intent. It is not to be construed most favorably for the grantee. In construing laws we have a right to look to the occasion which produced them; the practice and usage under them. They are not to be enlarged by implication. Exemptions from taxes must arise from distinct legislative powers. *Providence Bank vs. Billings & Pittman*, 4 Peters, 560, 561; *Charles River Bridge vs. Warren Bridge*, 11 Peters, 546-7-8.

The taxing power is vital and essential to all communities. It is a power retained from necessity; not to be surrendered nor yielded by implication. What is exempted and clearly given, is allowed, but no more. *Dartmouth College*, 4 Wheat. 699, 700; *Portland Bank vs. Apthorp*, 12 Mass. 252.

133 * A consideration need not appear for a law passed in favor of a corporation. *Ang. & Ames*, 265; 2 H. & J. 80.

In construing the Act of 1821, and determining its nature, we may look back to the occasion of passing it. 8 T. Rep. 468, 472; 11 John. 77; 1 N. Y. Laws, 1801, 556.

The words, shall not be taxed by any law of this State, held in New York a total exemption from taxes.

But here the franchise only is exempted. The word further in this Act imports similarity. It compels us to look back—no tax *ejusdem generis* can be laid. 1817, chap. 156; 4 Wheat. 316; 1835, chap. 142, sec. 2; 1821, chap. 192.

The Act of 1834 is in effect a re-enactment of the Act of 1821. Two Legislatures granted the same privileges, on the same principles.

When before a charter expires, it is renewed or extended to a more distant period, from the moment it is accepted it is a new grant. The old grant is merged, and the bank then exists under the new law. Such was the effect of the Act of 1834. It calls for a tax from the year 1836, though the banks existed under 1821 until 1845, and they are now paying under the Act of 1834, what is called the school fund.

As to the 2nd branch of the 2nd point of the appellee, the right of the State to impose a tax on the stock of resident stockholders. The same meaning is to be attached to the word bank in the 2nd and 11th sections of the Act of 1821. The term bank, as there used, does not refer to stockholders. It treats with them in the aggregate as a bank, and so contracts with them. 7 *Dana*, 338. The right to tax a bank is distinct from the right to tax stockholders. 1 *Nott & McCord*, 527; 2 *Bailey Rep.* 656.

The case of 4 *Wheat*. 316, gives an exception to the general rule of exemption.

A tax upon stock is paid by the individual owner, and not by the bank.

3. That even if the contract should be construed to exempt the real and personal property of the old banks, and the property of the stockholders therein, yet such exemption does not * extend to the new banks or those chartered since 1830; and moreover, **134** that the power of revocation, in certain cases, in these charters, reserves to the State the power of passing the general assessment law.

4. That the imposition of a tax of 20 cents upon every \$100 worth of property, upon both the old and new banks, under the said assessment law, is neither unequal, or oppressive, nor in violation of the Bill of Rights.

5. That taxation upon property within this State, wherever the owners may reside, is not against the Bill of Rights.

The 13th section of our Bill of Rights is a limitation of the power to tax, and not a grant of the taxing power. It is not forbidden to tax non residents. 4 *Wheat*. 428; 4 *Peter*, 564; 1 *Nott & McCord*, 527.

There was no period when the real property of non-residents was not taxed. 1781, chap. 4; 1785, chap. 83.

Meredith, for the Banks. The banks repelling the tax stand on different grounds. Those before 1830, nine in number, stand on the ground of contract created by the Act of 1821. The stockholders occupy the same ground. Those since 1830 place their defence on the Act of 1835, which they say, is a contract or equivalent to a contract—a grant of an immunity as extensive as that yielded to the old banks by the Act of 1821.

In regard to the old Banks, four questions include the whole controversy—

1. The meaning and true interpretation of the contract of 1821 ?
2. If that contract amounts to a total exemption or relinquishment of all power of taxation, was the Legislature of Maryland competent to conclude it ?
3. Was the contract in full force when the Act of 1841 passed, or was it affected by the Act of 1834 ?
4. If in full force, did the Act of 1841 impair it ? and I conclude from this, that if the Act of 1841 did impair it, it was void.

135 * I do not propose to argue the second question. It is no longer open. It is decided by the *State of New Jersey vs. Wilson, 7 Cranch*. No struggle can distinguish that case in principle from my second proposition. New Jersey parted with the power of taxation over certain lands in her territory as effectually as the Colonial Government of the same had parted with it. In the case of the Providence Bank, the same principle was maintained. Where a valid contract has passed between a State and a corporation, the Courts will not say it is not competent to a State to relinquish the power of taxing for a valuable consideration. Where is the objection to the exercise of this power ? What is an exemption ? It is a franchise ; it is an immunity. An immunity from taxation is no more or less than a franchise. All charters, to all companies, are exemptions. Franchises conferred are a part of the Eminent Domain. It is said this is a tremendous power. But is that an argument to a Court of justice ? Possibility of abuse is no argument to establish the non-existence of a power. All power is discretionary ; it may be illy directed. The responsibility is on the Legislature. They may call on the Courts to correct all abuses of power. The decisions are conclusive on this point.

First Question. What is the meaning and interpretation of the eleventh section of the Act of 1821 ? What creates the contract on which we rest ? It is the grant of a total exemption, whether of the franchise, or of all the property held by the corporations in this State. Our opponents say it merely exempts the franchise. They admit to some extent at least, the power has been relinquished. To what extent I am now about to discuss. It is a question of great importance—of constitutional law always important—the decision of which may seriously affect the financial concerns of Maryland. It also affects important interests of corporations and individuals. You are not to look to the present condition of the State, though compelled to summon to her assistance all her aid. If she has the right, let her have all the benefit to redeem her violated faith ; but I trust

136 a still greater stain may not be affixed to this * State, by again violating her faith upon another sacred point.

The eleventh section of the Act of 1821 contains a contract. In a statute we are to be governed by the intent on its face. We collect the intent from the words of plain, unequivocal import. Where there is no ambiguity you proceed no further. Ambiguous words

may drive you to other laws. If the language is significant, the Courts may not go out of it in search of intention, *Ducar. on Stat. 9 Law Library*, 51. In the absence of express words, or a strong implication, the Court will not presume a grant. With these rules to guide us let us come to the language of this eleventh section. It pledges the faith of the State, on the banks complying with that law, not to impose any further tax or burthen on them. The whole stress of the argument turns on the meaning of the word further in this connexion. What is it in common parlance? No further injury—does that mean that one will do no further injury of the same kind? Rather is it not—no further injury of any kind. This word is used for additional. It is often used as a substitute, for additional—for other, in that sense I apply it. It is said further burthens refer to burthens of the same species, and that the latter words are to be supplied. It is said the contract to exempt is not to be extended beyond that interpretation. To which we reply, the road was agreed to be constructed, and a school tax agreed to be paid for the extension of the charters, with the clause of exemption—an extension for twenty years with an exemption, provided the banks would build the road and pay the school tax—and we must look to the Act itself, and not to the votes and proceedings of the Legislature which led to an adoption, for its true meaning. The construction given to the word further leads to absurd conclusions. None could anticipate that the Legislature would impose further burthens of the same kind, to the price paid for those extended charters. The contract is admitted to be inviolate. None could anticipate that the Legislature would encroach on the Constitution. As to any argument derived from the practice of the bank, and their payment of other taxes—if this was wrong, acquiescence in the * wrong cannot make the Act of 1841 a constitutional exercise of power.

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A tax under the Bill of Rights must be uniform, and must be imposed for political purposes.

Third Point of Appellant.—The Act of 1834 is prospective in its provisions. It contains a grant from the expiration of the charter under the Act of 1821. It protects the banks and recognizes the Act of 1821. It gives an equivalent for banks relinquishing the faith of the State, not to object to further grant of banking privileges in Baltimore. The Act of 1835, is a recognition of the existence of exemptions under the Act of 1834, and extends them to the new banks. If the exemptions of 1821 is total, constitutional, unaffected by the Act of 1834, then, by the Act of 1841, imposing a tax on the real and personal property of those banks, and their stockholders, is the contract of 1821 affected? As regards the banks themselves, there can be no question about it. The Act of 1821 was a contract between the State and the banks. If the exemption was total, the real and personal property of the banks come within it—

upon its true construction both are exempted. If the exemption be partial, there is an end of the cause.

What is a bank with reference to the capital of the institution? The capital stock is under the sole control of the directors. The stockholders have no control there; they are only entitled to dividends, profits made by the capital. Whatever portion of the capital a stockholder has paid, it must endure to the end of the charter. He has only residuum. The corporation is a trustee for the stockholders, for each and for all. An agent with power to contract; to bind the stockholders collectively. All its acts are those of an agent, and they enure to the benefit of every and each stockholder. The tax of 1841 is on property. The capital stock of a bank includes all its property; each stockholder has only a residuary interest. The exemption then protects capital stock or it affords no protection at all. The Act of 1841 taxes such capital. The Legislature so understood it. Now the power to exempt is contested, yet the Legislature claimed that right in 1821. If it *exists, the Act of 1841 is
138 an infraction of it, and to say that a tax on property is not a tax on stock, and hence no infraction of the exemption, is an evasion unworthy of the State. It destroys the whole value of the exemption. 7 *Dana*, 338.

The intention of the Legislature as to the new banks is manifested in the Act of 1835, chap. 142, the preamble and first section. The ruling principle was to bring about equality between them and the elder institutions. It is said the Act of 1821 is repealed; we say it is irrevocable. An executed contract which cannot be touched. 13 *Connec.* 87, 95.

With regard to non-resident stockholders, the language of the thirteenth section of our Bill of Rights is as explicit as words can well be. The person taxed must be in the State. The property and person must both reside in the State. That concurrence is essential to the taxing power. The Acts adverted to by my opponents do not impose taxes on non-residents. It does not appear that in their application, they included non-residents. In the Kentucky case the stock of non-residents was not held liable to tax, and the policy of taxing them in Maryland has been greatly exaggerated. It would hardly diminish the capital of the State. For if foreign capitalists are not taxable, they would be induced to throw in more funds here, of which the public would reap advantage in another form. The Act of 1841, chap. 23, sec. 17, imposes a tax on non-resident stockholders, and obliges the banks to pay it. This is making one man pay the debt of another. Makes the bank assume the validity of the law, pay on the strength of it, and take the chances of recovery back. A regulation which has no sanction under our Bill of Rights.

J. Mason Campbell, for the Chesapeake Bank. After referring to the 13th section of the Maryland Bill of Rights, maintained, that

our Constitution did not contemplate taxing the property or persons beyond the State. The *situs* must be within the State. Jurisdiction, and the right to tax, were co-extensive, and the State could not tax beyond its jurisdiction. The stock of non-residents in our chartered banks, hence, could not be taxed.

* Next in point of fact, a double tax has been imposed upon the banks. All their real and personal property is taxed, and **139** the shares of the capital stock are also taxed. Now with reference to the charter of these companies, the manner of their creation and organization, a tax upon their property, and the shares of stock in them, is in point of fact a double tax. The dividends of such institutions are no tests of intrinsic value. These depend on temporary circumstances. There may be no dividends. The purchaser, to determine the value of stock, looks behind the shares; he looks at that of which the shares are the representation—the property of the corporation. He regards the general condition and value of all the property, and from these deduces value of shares. He considers shares and property as identical, and not two distinct subjects of property of different values. They combined have but one value. The stock is the representative of the value of the whole property of a corporation. Every corporation has a distinct object, no matter what. When the Legislature creates it, the capital is paid in, but it is soon converted into the objects for which it was created. The money is transmuted into the objects of the corporation. Let a railroad for instance be wound up—that is a test. What is the subscriber's right. Make a division among shareholders, and each would get one-twenty thousandth part of a road. Money value of stock must be dismissed from our ideas. 4 *Peter*, 562.

In such cases there is no new creation of property; it has only changed hands. Individuals have surrendered their money; contributed it; put it into a common reservoir—where is the property? There exists in such case but one species of property? Who has the actual worth? In this respect a corporation is the similar of a partnership—one flows from the law, the other from the act of the party.

The power to exempt from taxation is not expressly granted to the Legislature; but the taxing power is fully given as to persons and property within the State; to exempt them is but the repression of that authority. The State has all power over the subject but what is denied, and to make a case of want of * power to exempt, the denial of such power must be shown in the Constitution. **140** New Jersey, Massachusetts and Connecticut, all exempt particular subjects from taxation. It is a question entrusted to legislative discretion. 7 *Cranch*, 165; 2 *Pick*. 403; 7 *Pick*. 110.

The power to exempt, frequently exercised by the Legislature of Massachusetts. 1779, 80; 1794, chap. 33; 1794, chap. 66; 1796, chap. 17.

The Act of this State, of 1821, chap. 191, contains many exemptions from the taxing power; the soldiers' lands in Allegany, in their hands or in the hands of their descendants, were exempted.

Upon the appeal of the Appeal Tax Court from the refusal to assess certain property of the Baltimore and Susquehanna Railroad Company. "It was admitted, that the railroad company had conveyed to the State of Maryland all its lands and tenements, capital stock, estates and securities, and goods, chattels, property and rights, now or at any time hereafter to be acquired; and the net tolls and revenues of the company, as an indemnity to the State against the obligations under which the State has come, on account of it, amounting to \$2,227,151.65, and the interest payable by the State thereon.

"It is further admitted, that at the time of the passage of the Tax Act of 1841, there was a large sum due by the company for such interest paid by the State on its account; that such sum on the 1st December, 1841, amounted to \$279,590.84."

Upon the appeal by the same Court against the Chesapeake Bank, it was agreed that the record should be amended by a statement of the manner in which the stocks held by the bank (the assessment of which was refused below,) are owned by it, whether as its property or as securities for moneys loaned by it. If held in the latter capacity, the State does not claim to tax it.

Upon the appeal of the same Court against the Neptune Insurance Company, it was agreed, that the stockholders in this
141 *company have been individually taxed for their shares of the capital stock of the company, and that the stocks sought in this case to be taxed, are the property of the company absolutely.

Upon a similar appeal against the American Life Insurance and Trust Company, it was agreed, that the stockholders therein had been individually taxed for their shares of the capital stock of the company, and that the stocks sought in this case to be taxed, are the property of the company absolutely.

Steele, (D. A. G.,) on behalf of the State in those cases where the Appeal Tax Court had refused to tax stock in certain corporations belonging to certain other corporations, as corporate property. As to the stock owned by the Susquehanna Railroad in the Citizens Bank of Baltimore, he maintained that the mortgage by the company to the State of all its funds did not alter the question. The debt is due the State, and the tax is beyond the debt. The property mortgaged is not the State's, she has only a lien on it; and he maintained—

1. That the bank stock exempted from taxation by the official tax Court, is not included within any of the exceptions of the 1st section of the Act of 1841, chap. 23, and is liable to be taxed under that Act. The terms, judgments, &c. or other securities belonging to

any bank or other incorporated institution, the capital whereof is taxed, did not exempt the Susquehanna Railroad Company; that company was not one of the "other incorporated institutions" designed to be exempted. Those words in this clause allude to those other institutions expressly mentioned in the first section of the Act of 1841, as incorporated literary or charitable institutions, county schools, &c., and hence a railroad company was not within the excepting clause. The Legislature had in view either those other corporations named in the law, or corporations of a kindred character with the banks; neither does bank stock come under the head of other securities in that connexion; it did not mean to except bank stock belonging to any bank or other company. 10 G. & J. 308.

* 2. Upon the true construction of the Act of 1827, chap. 142 72, the said bank stock is not exempt from taxation. It was not invested for the purposes of the company. By the 20th section of the charter, the object of which was the construction of a railroad from the City of Baltimore to the River Susquehanna, it was declared that "that the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the impositions of any tax or burthen, by the State's assenting to this law."

Under this clause the company cannot claim exemption from tax except on their capital stock. If the same property exists in two distinct forms, an exemption from tax in one form does not exempt it in the other form. Bank stocks are not shares of or in railroads, hence it cannot be exempted. In *Wildman vs. Wildman*, 9 Ves. Jr. 177 a distinction was taken between a transfer of stock and payment of money to a married woman. It survives to her. The interest in stock is nothing but the right to receive the dividends perpetually.

3. The Legislature had no power to except the property of the appellees from taxation.

J. Mason Campbell for the Susquehanna Railroad Company, insisted upon the converse of the points raised by the State, and maintained, that from the Bill of Rights in 1776 to 1841, no tax laws had passed in Maryland without exemptions—*contemporanea expositio, fortissime est in lege*.

By the Act of July, 1779, chap. 6. An Act for Naturalization. Section 6, it was enacted, that no tax should be imposed on any foreigner, tradesmen, artificers and manufacturers, coming into this State and taking the declaration aforesaid, or his property, for the term of four years after his arrival.

By the Act of March, 1780, chap. 25. A supplement to the Act for the assessment of property within this State. The taxes might be paid in money, certificates, or in cattle.

By the Act of 1788, chap. 7. The Legislature loaned Amelung, a glass manufacturer in Frederick County, who had in his employment

143 three hundred and twenty persons, one thousand * pounds, and granted him an immunity from taxes for six years.

By the Act of 1792, chap. 71. An Act for valuation of real and personal property within this State. Various exceptions were made from the taxing power.

The Act of November, 1793, chap. 70, excepts property belonging to this State, or the United States; houses for public worship; burying grounds; property belonging to any county, college or county school; crop and produce of lands in the hands of the cultivator; provisions for family use; plantation utensils; working tools of mechanics and manufacturers; wearing apparel; goods, wares, and merchandises; all home made manufactures in the hands of the makers; all stills; all ready money; all grain and tobacco; all licensed vessels above twenty tons burthen, from valuation and assessment. And there are further exceptions in the Acts of 1797, chap. 89; 1803, chap. 92: 1812, chap. 193. There has never been a general tax law without exemptions of some sort; and see 3 *Bland*, 253, 258, 264. The fact of exemption has gone hand in hand with the taxing power. I refer to this case particularly, for to every one acquainted with the thorough manner in which the Chancellor examines and exhausts every subject he takes up, it is unnecessary for me to say that he has collected all the laws on this subject. Treble taxes were laid on non-jurors. Under the 13th section, Bill of Rights, the Legislature has exercised ordinary, extraordinary, and exempting powers of taxation. They have a right to discriminate with a political view. This makes an exception. Taxes and punishments are followed often by penalties and bounties. Penalties and bounties are incidental to sovereignty. Religion was to depend on individual efforts, and hence no property so applied was exempted. And when a great political object was to be achieved through the railroad company, at private expense, another exemption was granted.

This property ought not to be taxed, because the State is owner as mortgagee.

144 * *Constable and Howard*, in reply for the Appeal Tax Court, cited—12 *Mass.* 252; 11 *Peters*, 644, 659; 4 *Peters*, 168.

This case involves the question, whether mortgagors having thrown the legal title on the mortgagee, can also cast with it the burthen of taxation. It is a new principle, and it seems to us an invasion upon the law of mortgage, and the relations of the parties. The mortgagee is entitled to his interest without deduction, and the mortgagor who continues to reap the profits ought to pay the taxes. This Court cannot foreclose the mortgage and cut of the mortgagor's rights. 6 *Connec.* 230; 7 *Connec.* 339.

Upon the appeal of the Appeal Tax Court, as representing the State, in the refusal of that Court to tax various stocks held by corporations, banks, and insurance companies, whose capital stock had been taxed—

Steele, (D. A. G.,) for the State. 1. The State does not claim to tax stock held by the banks as a security for debts due them, but maintained that all other stocks held by them did not come within the exceptions of the Act of 1841, chap. 23, sec. 1, and are liable to taxation under that Act.

2. The tax in question is not a double tax, and therefore no violation of the 13th Article of our Bill of Rights.

McMahon, for the Western Bank. This corporation holds property as agent for individual stockholders, and the State cannot tax the principal and agent at the same time. The agent may present the question if the principal is taxed. He may show who ought to be taxed, or that it has been laid on the other party. If twice taxed, the stockholder may raise the question. Where the Court cannot see the fact, they will permit the corporation to show the existence of a double tax, and repel it. Is there any such principle as a double tax in the Bill of Rights? This we deny. If I sell my title to an individual, and take his note, and yet
 * hold my property, I am not to be taxed as holder of the prop- **145**

erty, and also upon the note. A double tax is a tax falling twice on the same interest. 2 *Kent*, 331. All taxes should be equal. Equal taxes are demanded by our Bill of Rights. It denies the right to a double tax in all cases. Acting on the same property in any mode it is wrong. In the case of a hogshhead of tobacco in a warehouse, represented by a certificate, which is a sort of currency, the evidence of its deposit, the tobacco and certificate cannot both be taxed. The declaration in the Bill of Rights, that every person ought to contribute according to his actual worth, means, must so contribute. This is the organic law; not a discretionary power, but a binding rule. A tax on the stock is a tax on the whole property of the corporation, and it is not to be re-taxed as capital. The stock includes all the property. The stockholders represent the whole property united, hence the corporation and shareholders are not both taxable. The Legislature by their exemptions show they did not mean to impose a double tax. They did not tax debts due the bank, which might be laid on amount far beyond the capital—that would include the credit also. Hence a large amount beyond capital is expressly exempted. The representative and the thing represented cannot both be taxed.

Mayer, for the Neptune and the American Life Insurance and Trust Company.

For all the purposes of property, a Court of law will regard a corporation as a mere association of individuals. Where justice requires it, the Courts will resolve a corporation into its individuality. Corporations for the purposes of convenience, are authorized to sue in certain forms. In the creation of a corporation the State parts with no portion of her sovereignty. By that Act her sovereignty is not impaired; nor is it property to be treated, as other, than the property of individuals. 4 *Peters*, S. C. 546, 562; 5 *Cranch*, 61; 7

Wheat. 552. Hence a tax on stock and corporate property is a double taxation, and not admissible.

* The non-residence of the stockholders of the American
146 Life and Trust Company exempts them from taxation. 16
Pick. 573.

Howard, for the State, maintained, that as to all stock purchased after the passage of the Act by the companies, the tax thereby imposed could not be considered a double tax. The stock had been previously taxed, and the tax imposed upon the same stock in the hands of a new proprietor, cannot be treated as a double tax.

Geo. M. Gill, upon his appeal—maintained in this case, the tax was levied upon all his possessions for State purposes, without any regard to his actual worth in real and personal property, with no deductions for large sums due by him on mortgage, while the sums due him in that mode were assessed; that the same rule being observed both in the county and city taxes of Baltimore, it fell upon him in fact in a three-fold ratio. No such practice was legal under our Bill of Rights. Standing upon the Act of 1841 alone it might be defended, but under the 13th section of our Bill of Rights, every citizen must contribute only according to his actual worth. Now actual worth can only be ascertained by deducting what a citizen owes from what he possesses. The words actual worth are of the most essential import in this clause, and give a peculiar meaning—a controlling meaning to the whole clause. Actual worth is contradistinguished from imaginary or fictitious worth. It was a general system laid for the support of government, not a license or a temporary rule, but a general tax to pay debts; and I maintain, that the sums due on mortgage should be deducted from the sums claimed on mortgage, to and by each citizen, otherwise fictitious, and not actual worth is taxed.

Steele, (*D. A. G.*.) replied, The State looks to the other ownership of each species of property. Money due on mortgage is taxed in the hands of the creditor. It is property which produces an annual profit. The law does not tax the worth of a citizen, but the specific
147 property of which he is owner, * without any reference to his
 liabilities. In this view the Act of 1841 is no violation of the Bill of Rights.

Dulany, for the Washington College and Dr. Samuel K. Jennings, maintained—

1. That the tax imposed upon the Washington College by the assessors, is wholly unauthorized by the Act of 1841, chap. 23, on the contrary, the first section of said Act, and in the proviso thereof, colleges are exempted.

2. The tax upon the judgment against the college property, confessed in favor of Dr. Jennings, was for the benefit of the college itself; and that the money obtained thereupon was applied to the erection of the college, and that therefore the tax upon the said

judgment is virtually a tax upon the college itself, which it will have to pay, and is therefore unauthorized by the said Act, for the reasons aforesaid.

Steele, Howard, and Constable, for the Appeal Tax Court, maintained—

1. That the Legislature had no right to exempt the property of Washington College from taxation.

2. That the judgment of Dr. Jennings against said college, is taxable under the Act of 1841, chap. 23; he standing upon the facts disclosed in the record as an ordinary judgment creditor of the college, and there being no exemption in said Act given to creditors of incorporated literary institutions.

Upon the appeal of the Savings Bank of Baltimore, that bank filed the following statement:

To the Appeal Tax Court:

The Savings Bank of Baltimore appeals from the return of the assessors, and claims to be exempt from taxation on the property in the possession and care of said bank, on the ground that being merely a bank of deposit, having no stockholders or fixed capital, is itself free from liability to taxation on its deposits, and consequently is exempt from taxation on property which is merely lodged with it as collateral security for its loans, or held as investments of deposits, subject to be * withdrawn at pleasure; which loans and investments are merely the representatives of the deposits. 148

The bank also objects to the assessment of property in its name, on the ground that said property being temporarily held as security for loans, and not owned by the bank, is property assessable to the individuals to which it belongs; to which individuals it is fairly to be presumed, (as the bank conceives,) it must have been assessed.

The bank considers itself as only bound under the law to return a list of foreign stockholders, none of which it has, having in fact no stockholders.

November 30th, 1841.

J. CUSHING, *President S. B. B.*

Upon this appeal, *McMahon*, for the bank filed the following points:

The appellant will contend, that the decision of the tax Court assessing the stocks held by its securities is erroneous, and ought to be reversed.

1. Because, as the stocks are held by the appellant as securities for money lent, the party pledging the stock to secure the loan is, within the contemplation of tax Act, the owner of the stock, and liable to the tax on it, and not the pledgee, the appellant, who is only liable, if at all, on his loan.

2. That the appellant being an institution incorporated solely for the purpose of receiving and investing deposits made by individuals, and the securities which it holds being mere investments of such deposits, for the benefit of the depositors, are liable under the Act to a tax on their deposits, (being money at interest,) and that there-

fore, the tax on the securities which are taken to secure its investments of said deposits, operates as a double tax on the depositors, and is contrary to and forbidden by the Bill of Rights of this State; and also by the intent and equity, if not the letter of the exceptions of the first section of the tax Act.

Upon further consideration, however, the counsel for the Savings Banks dismissed this appeal, and the questions raised were not argued or decided.

149 *In the case of the appeal of the *Philadelphia, Wilmington and Baltimore Railroad Company vs. The Commissioners of Harford County*, the parties by their counsel filed the following agreement as a part of the record in that case:

"The Philadelphia, Wilmington and Baltimore Railroad Company was formed by an agreement of union, duly made and entered into between the following corporations, to wit: The Baltimore and Port Deposit Railroad Company, 'The Wilmington and Susquehanna Railroad Company,' and The Philadelphia, Wilmington and Baltimore Railroad Company (of Pennsylvania.) This agreement of union was made on the day of its date, under the authority claimed under, and in pursuance of the directions of the several Acts of Assembly therein recited; and was entered into after the primary meetings of stockholders as required by said several Acts; and was certified and recorded as required by said several Acts. A copy of said agreement is herewith produced as a part of this statement, marked Exhibit A. Copies of said several Acts are also herewith filed as a part of this statement, marked Exhibit B.

"The Baltimore and Port Deposit Railroad Company was incorporated by the Act of 1831, chap. 288, of the General Assembly of Maryland, which Act and the several supplements thereto, are intended to form a part of this statement. The Wilmington and Susquehanna Railroad Company, (one of the parties to said agreement marked A,) was formed by an agreement of union, duly made and entered into on the 18th April, 1835, between the Delaware and Maryland Railroad Company, and the Wilmington and Susquehanna Railroad Company, (of Delaware,) in virtue and in strict pursuance of the several acts in said agreement of union recited; and was certified and recorded as directed by said several acts, a copy of which last mentioned agreement of union, herewith filed as a part of this statement, marked Exhibit C. The said corporation, the Delaware and Maryland Railroad Company, was incorporated by the Act of 1831, chap. 296, of the General Assembly of Maryland, which Act and the several supplements *thereto, are intended to form a

150 part of this statement. The Wilmington and Susquehanna Railroad Company (of Delaware,) was incorporated by an Act of the General Assembly of the State of Delaware, passed on the 18th day of January, 1832, which Act and the several supplements thereto, are intended to form a part of this statement, copies of which are

herewith filed, marked Exhibit D. The Philadelphia, Wilmington and Baltimore Railroad Company (of Pennsylvania,) was originally chartered by an Act of the General Assembly of the Commonwealth of Pennsylvania, approved on the 2nd day of April, 1831, by the name of 'The Philadelphia and Delaware County Railroad Company,' which, by a supplement to said Act, passed the 14th day of March, 1836, was changed to the corporate name of 'The Philadelphia, Wilmington and Baltimore Railroad Company,' which said Acts, and the Acts supplementary thereto, are intended to form a part of the statement, copies whereof are herewith filed, marked Exhibit E.

"The map, herewith filed, marked Exhibit F, is a correct and complete profile of the railroad of the Philadelphia, Wilmington and Baltimore Railroad Company, in its whole extent, and is intended to form a part of this statement. That portion of said railroad which lies west of the Susquehanna River, that is to say, between the City of Baltimore and the River Susquehanna, lying partly in Baltimore County and partly in Harford County, was made and constructed, (prior to the agreement of union, of which Exhibit A is a copy,) was owned in severalty, by Baltimore and Port Deposit Railroad Company. That portion of said railroad which lies east of the Susquehanna, and between that river and the divisional line between the State of Delaware and the Commonwealth of Pennsylvania, was made by the Wilmington and Susquehanna Railroad Company, and (prior to the said agreement of union, of which said Exhibit A is a copy,) was owned in severalty by said last mentioned company. Previous to the consolidation of the Delaware and Maryland Railroad Company and the Wilmington and Susquehanna Railroad Company, (of Delaware,) into one company, the line of the road which the said corporation, 'The Delaware and Maryland Railroad Company' was authorized to make, was that part of said road **151** which lay east of the Susquehanna, and between that river and the divisional line between the States of Maryland and Delaware; and that part of said road which the said corporation, 'The Wilmington and Susquehanna Railroad Company (of Delaware,)' was authorized to make, is that part of said road which lies between the divisional lines of the States of Maryland and Delaware, and the Commonwealth of Pennsylvania. Each of said last mentioned corporations, prior to their consolidation, had commenced the location and construction of their said several parts; but at the time of the union under the agreement, of which Exhibit C is a copy, neither part was completed; but the whole was completed by the Wilmington and Susquehanna Railroad Company, after the agreement of union, of which said Exhibit C is a copy. The river Susquehanna is passed over by the use of a steamboat belonging to the appellant, and used by the appellant for the sole and exclusive purpose of transporting persons and property across said river from shore to shore, from

the terminus of the railroad track, on the other shore—said steamboat is specially constructed for its use in connection with said railroad, and has rails laid on its upper deck, which are so constructed that the said rails are placed in juxtaposition with the railroad track of the railroad; when the boat is in place for use in connection with the terminus of the road on either shore, on that, cars are received upon the said deck of said steamboat from the railroad track on one shore, and passed over the river by the said steamboat—and on to the railroad track on the other shore from off said boat, as the means of passing cars, &c., across the river; and prior to the agreement of union, of which Exhibit A is a copy, was owned jointly, but in unequal parts, by the Baltimore and Port Deposit Railroad Company, and the Wilmington and Susquehanna Railroad Company, and was managed and kept in repair at the joint expense, in the proportion of their respective interest therein, by the said last mentioned two companies. The said steamboat before *and since the said

152 agreement of union, of which Exhibit A is a copy, usually remained, and still usually remains, in a dock constructed in the Susquehanna River, by protecting piers projecting from the Harford shore, when not actually in use; which dock is within the limits of Harford County. That part of said road which lies east of the divisional line between the State of Delaware, and thence extending to the City of Philadelphia, was, prior to the said agreement of union, of which Exhibit A is a copy, constructed and owned in severalty by the said corporation, called, The Philadelphia, Wilmington and Susquehanna Railroad Company, (of Pennsylvania.) The principal office of the appellant, ever since the agreement of union, (of which Exhibit A is a copy,) for the transaction of the business of said company, has been established and held in the City of Philadelphia, at the eastern terminus of said railroad. The stated meetings of the board of directors, by the terms of said agreement of union, are to be held alternately at Wilmington and Philadelphia. There are offices at Philadelphia, Wilmington and Baltimore, at any one of which transfers of stock may be made. The stated meetings of the stockholders are to be held in the City of Wilmington. Prior to said agreement of union, the principal office of the Baltimore and Port Deposit Railroad Company was held in the City of Baltimore. All the corporate funds and capital stock of said appellant have been expended and consumed in the location and construction of said road, and in the construction of such works and improvements as were necessary and expedient to the proper completion and use of said road, and in the purchase of cars and machinery of transportation, &c., necessary and indispensable to the completion and use of said road; and that the said company has not, at any time, since the said agreement of union, owned or held, and does not now own or hold any estate, real, personal or mixed, other than what forms a part of, or necessarily appertains to, the construction

and completion of said road, and its works and improvements, and in the purchase of cars and machinery of transportation, &c., necessary and indispensable to its use; and that over and * beyond its actual capital, it was found necessary to raise by loan a large additional amount for the purpose aforesaid, **153** and which amount has been so applied. The appellant has been assessed under the said Act by the assessors of Harford County, whose assessment was confirmed, on appeal, by the Commissioners of Harford County, with the sum of \$127,000, as shewn by the valuation filed in this case. The several parcels or tracts of land, valued as 200 acres, at \$10 per acre, as held and occupied by said company from the Gunpowder Falls to the Susquehanna River, lie within the limits of Harford County, and consists of the land held and occupied by the said company, portions of which were acquired under condemnations for the use of said company under the provisions of the said Act of 1831, chap. 233, and other portions of which were acquired by agreement with the owner for the bed, water stations, depots, and ticket offices of said company. The title acquired in each case of agreement with the owner being consummated by deed of bargain and sale to the president and directors of said company and their successors, in the ordinary terms of a conveyance in fee. The houses and other improvements on the road and at Havre de Grace, are the depots, ticket offices, and water stations, of said company, within the limits of Harford County. The railroad track iron, within the limits of Harford County, valued at \$95,000, consists of the rails actually laid down and in use as the track of said railroad, within the limit aforesaid. And the steam ferry boat at Havre de Grace is valued at \$15,000, is the steamboat hereinbefore mentioned, used as aforesaid, for the sole and exclusive purpose of transporting persons and property across the river Susquehanna, from the terminus of the railroad track on one shore, to the terminus of the railroad track on the other shore, in the manner hereinbefore mentioned, said steamboat is, and continually since its use as aforesaid, has been duly enrolled and licensed at the Custom House in Baltimore, according to the Act of Congress. The capital stock of the appellant, under the agreement, is divided into 45,000 shares of \$50 each; and which stock is held by various persons, many of whom * reside in the State of Maryland, and others of whom, and a large ma- **154** jority of whom reside in other States, and in Europe, and was so held at the time of said union. The stockholders residing in the City of Baltimore in Maryland had actually been assessed to the extent of the stock by them respectively held, no objection being taken to said assessment, nor any appeal prosecuted therefrom, no assessment has been made on the stock of any of the stockholders residing in Harford County or Cecil County, if any reside there, nor on the stock of said non-resident stockholders.

Otho Scott and W. Schley, for the P. B. and W. Railroad Company. The appellants, in support of the appeal in this case, and to shew that it, in its corporate capacity, is not liable to be assessed in respect of said land and other property, or, if liable to be assessed at all, not to the extent, or on the principles on which said assessment was made, intends to rely upon the following points—

1. That by the Act of March Session, 1841, chap. 23, no property of any description was intended to be burthened, directly or indirectly, with the imposition of a double tax.

2. That by the same Act, the capital stock of the appellant, (if not exempt from taxation,) is made liable to the tax thereby laid, and is to be valued and assessed in the names of the respective stockholders, and as the individual property of said stockholders; which stock fully and effectually represents the railroad of the appellant, and all necessary works therewith connected and indispensable to its use; and so represents the said land and other property assessed by the said assessors to this appellant, in its corporate capacity; so that if said assessment be not corrected, the said property will, in effect, be subjected to a double tax, contrary to the intention of said Act, and against the principles of the Bill of Rights.

3. That the said railroad and its necessary works therewith connected and indispensable to its use, are vested in the appellant, in its corporate capacity, in trust, for public use and * subject to
155 the right of the public to use the same, in the manner and on the terms prescribed by law, so that the appellant, in its corporate capacity, has no beneficial ownership in said road, as real property corporeal, and is not liable to the payment of any tax assessed thereon, as real property corporeal; and therefore is not liable to the assessment made in its name by the said assessors.

4. That the appellant has no beneficial right of property in said railroad and its necessary works therewith connected and indispensable to its use, except the right to demand and receive the tolls thereby allowed, for the transportation of passengers and property over and along the same; so that if the said appellant, in its corporate capacity, is liable to be assessed at all in respect of its property in said road, it ought to be assessed not with the value of the *corpus* of said road, or any part of said *corpus*, but in respect of the value of its franchise, or incorporeal right to demand and receive tolls as aforesaid.

5. That the appellant, if taxable at all, is taxable only, under the provisions of said Act, in the City of Baltimore; inasmuch as its principal office is there established, and the western terminus of its road is in that city also.

6. That the assessment was made upon an erroneous principle, in this, to wit: that whereas, said land, houses and other improvements, and railroad track iron, are permanently united and co-exist, as a railroad with necessary works indispensable to its use; yet the said

assessors, for the purposes of valuation and assessment, have separated the said railroad and works into parts, and have valued the original constituent materials of said railroad in severalty; which is calculated to work partial injustice in its results, and is contrary to the provisions of said Act.

7. That the said appellant, in its corporate capacity, if liable to any assessment in respect of its permanent and fixed works within this State, is only liable to be assessed in respect thereof, at the value of the land thereby occupied, *qua* land; and wholly independent of the value of said permanent and fixed works accruing from such improvement of said land.

* 8. That upon the true construction of said Act of 1841, chap. 23, the appellant, in its corporate capacity, is not made **156** liable to any tax or assessment in respect of its railroad and necessary works therewith connected, and indispensable to its use as a railroad, either as supposed owner of the *corpus* of said railroad and its works, or as owner of the franchise to demand and receive tolls, or in respect of its fixed and permanent works, in their improved condition; or in respect of the land occupied by said railroad and its works, at its rate of value *qua* land; or in any manner, or to any extent.

9. That upon the state of facts in this case, the said steamboat is not subject to assessment by the assessors of Harford County; and that the said assessment in this respect is erroneous, and unwarranted by law.

They cited 13 *Serg. & Low.* 334; 2 *Barn & Ald.* 501, 571, 646; 4 *Paige*, 386.

Steele, (D. A. G.,) Howard, and Constable, for the Commissioners of Harford County, maintained—

1. That the exemption from taxation of the shares of the company incorporated by the Act of 1831, chap. 296, is void, as being against the Declaration of Rights and the Constitution of the State of Maryland, whether such exemption be claimed by the company incorporated by that Act, or any other company formed by an union or junction with it.

2. That such exemption, if good, was not by any subsequent Act of Assembly transferred to or vested in the appellant.

3. That if such exemption be not void, yet the reservation to the State of the power to tax the permanent and fixed works of the company, which are within the limits of Maryland, justifies and sanctions the imposition of the tax which is the subject of the present appeal.

BY THE COURT:—

Ordered and adjudged, that the appeals of the resident and non-resident stockholders of the Union Bank of Maryland, (*ante* 121,) be

affirmed, except as to certain incorporated literary and charitable institutions, and the Union Bank, which were reversed.

157 * That the appeals taken in the name of the Appeal Tax Court, (*ante* 121, 122,) and from the refusal of that Court to assess certain stocks held by the Baltimore Insurance Company, and other insurance companies and banks in the corporations there enumerated, and by the Baltimore and Susquehanna Railroad Company in the Chesapeake Bank, be affirmed.

That the appeal of Geo. M. Gill, (*ante* 122,) be affirmed.

That the appeal of Charles F. Mayer, (*ante* 122,) be affirmed.

That the appeal of Washington College, (*ante* 123,) be reversed.

That the appeal of Dr. Samuel K. Jennings, (*ante* 123,) be affirmed.

That the appeals of Daniel Atler, and various other stockholders of the American Life Insurance and Trust Company, be affirmed.

That the appeal of the Philadelphia, Wilmington and Baltimore Railroad Company, (*ante* 123,) be affirmed.

That the appeals of the resident and non-resident stockholders of the Farmers and Merchants Bank, and the other banks enumerated, (*ante* 123, 124,) be affirmed.

DORSEY, J., dissented from the judgment of this Court, affirming the appeals taken in the name of the Appeal Tax Court, (*ante* 121, 128,) in all cases in which that Court had refused to assess the stock held by the insurance companies and banks, either in their own, or other corporations.

DENNIS O. BYRNE vs. JOHN MCPHERSON, Administrator of JOHN BRIEN, Surviving Oblige of JOHN MCPHERSON.—December Term, 1841.

Upon a judgment in favor of A. and B. the counsel of the surviving plaintiff A. ordered the clerk of the County Court to issue a *scire facias*, directing it in writing in the name of the survivor. The writ in fact was issued in the name of both the original plaintiffs. Upon motion of the administrator of the survivor, who had become a party since the writ was sued forth, the Court ordered a duplicate of the original *scire facias* which had been lost, to be made out and filed, and then ordered an amendment of the writ, so as to conform to the plaintiffs' original instructions. Affirmed upon appeal. (a)

158 * APPEAL from Washington County Court. This was a *scire facias* sued out on the 2nd December, 1833, reciting a judgment of November Term, 1832, recovered by John McPherson and

(a) Approved in *State vs. Logan*, 38 Md. 9. See *Prather vs. Manro*, 11 G. & J. 179.

John Brien, against the appellant, for as well the sum of \$742.37 debt, as the sum of \$2,000 damages, &c., suggesting the death of John McPherson, and that execution in favor of John Brien, as surviving obligee of John McPherson, remains if, &c., returnable on the 4th Monday of March, 1834. This writ was returned, made known, and the appellant appeared. At November Term, the death of John Brien was suggested, and the cause continued to make proper parties, and so the cause was continued from term to term, until November Term, 1838, when John W. McPherson, administrator of John Brien, appeared to prosecute said writ, and filed in the County Court the following statement and affidavit:

"In this case I distinctly recollect going into the clerk's office, at the request of, and in company with, John Brien, Senior, and searching for and finding the original judgment and the proceedings thereon, of John McPherson and John Brien against Dennis O. Byrne, a short copy of which judgment is herewith exhibited. Upon which judgment he directed me to cause to be issued a *scire facias* to revive it, as John McPherson was then dead. I accordingly directed it, and taking the docket to the clerk, I directed him to enter on his new docket, and stood by and saw him do it, or did it myself, a *scire facias*, in the name of John Brien, the surviving partner, John McPherson being dead, and directed him to issue the writ. The clerk, or one of his deputies, had issued the writ in the name of both John Brien and John McPherson, as though they were both alive. I afterwards moved to amend the writ, and it has been continued under that motion ever since. I further state that the sole object I had in view at that time was to cause to be issued a proper writ of *scire facias*, in the name of John Brien, as survivor of John McPherson, deceased, to revive the judgment for the use of said John Brien, and his son John McPherson Brien, but in the execution of that object * I think I directed the docket entry to be made precisely as it was made on the rough original. **159**

JOSEPH I. MERRICK."

"William Smith, one of the clerks in the office of the clerk for Washington County Court, being duly sworn here in open Court, deposeth and saith, that the *scire facias* numbered 15, on the appearance docket of March Court, 1834, was docketed by Joseph I. Merrick, Esq., an attorney of said Court, in his own proper hand-writing, as follows:

"John Brien, surviving partner of John McPherson, use of John Brien and John McPherson Brien vs. Dennis O. Byrne.

Scire facias to revive judgment, and the following letters and figures in the hand-writing of O. H. Williams, clerk of said Court, viz: D. \$742.37, \$2,000 Damages, Costs \$9.59. No. 275, N. C. 1822.

"That in pursuance of said entry there was issued a *scire facias*. And upon the docket it further appears that said *scire facias* was

returned by William H. Fitzhugh, the then sheriff, 'made known,' at March Court, 1834, and filed among the records of said Court; that he has, at several times, made diligent search for said *scire facias* among the papers of the office of the clerk for the county, and has been unable to find them; that from the best of his recollection, the last he knew of said papers was, that they were in the possession of the said Joseph I. Merrick, since which time he has not seen, or been able to trace said papers further."

In Washington County Court, November Term, 1838. On the foregoing statement of facts, it is, on motion of the plaintiff by his counsel, ruled by the Court, that the clerk of this Court make out and file in this case as a part of the proceedings thereof, a *scire facias* on the original judgment of this Court, rendered at the November Term, 1822, in favor of John McPherson and John Brien against Dennis O. Byrne, for \$742.37 debt, and \$2,000 damages and costs; the said *scire facias* to be in the name of the said John Brien and John McPherson, dated on the 2nd day of December, 1833, with
 160 the return of * the sheriff of "made known," regularly endorsed thereon, in due form of such return; and that the said *scire facias* and return be filed, *nunc pro tunc*, or as if the proper and respective dates at which said *scire facias* was issued, and said return of the sheriff was made, and that the said cause be considered as now standing in the same condition, and proceed in the same manner, as if said original *scire facias* and return thereto had not been lost or mislaid, unless cause to the contrary be shewn by the defendant by ten o'clock on Monday morning next.

And on the foregoing statement of facts, and on further motion of the plaintiff by his counsel, it is further ordered by the Court, that the clerk of this Court, after he has made out and filed the *scire facias*, and sheriff's return thereto as aforesaid, amend the same so as to make it a *scire facias* in the name of John Brien, as surviving obligee of John McPherson, deceased, on the original judgment of this Court, rendered November Term, 1822, in favor of John McPherson and John Brien against Dennis O. Byrne, for \$742.37 debt, and \$2,000 damages and costs, unless cause to the contrary be shewn by the defendant by ten o'clock on Monday morning next.

These rules were afterwards made absolute. Thereupon further proceedings in the premises were continued, and the rule aforesaid enlarged, by regular continuances from term to term of the said Court, from the said third Monday of November, 1838, until the fourth day of December, 1840.

Whereupon it is ordered by the Court here, that the clerk of this Court make out and file in this case, as a part of the proceedings thereof, a *scire facias* on the original judgment of this Court, rendered at the November Term, 1832, in favor of John McPherson and John Brien, against Dennis O. Byrne, for \$742.37 debt, and \$2,000 damages and costs; the said *scire facias* to be in the name of the

said John Brien and John McPherson, dated on the second day of December, 1833, with the return of the sheriff of "made known," regularly endorsed thereon in due form of such return.

* Which said *scire facias* is in the words and figures following to wit: 161

"Washington County, to wit: The State of Maryland to the sheriff of Washington County, greeting: Whereas, at," &c.

It was also agreed, that this case shall be considered in the Court of Appeals, in the same manner as if a bill of exceptions had been taken to the direction of the Court to the clerk, to supply the lost *scire facias*, and a separate bill of exceptions had been taken to the amendment allowed by the Court to the writ so supplied.

The County Court [SHRIVER and T. BUCHANAN, A. J.,] then ordered a *fiat*, according to the tenor of the amended *scire facias*, and the defendant appealed.

The cause was submitted upon written arguments to BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS and SPENCE, JJ.

Price, for the appellant, cited, 2 *Tidd's Pr.* 753; *Tidd*, 767; *Step. on Pl.* 105, 106; *Step. on Pl.* 106. The Acts of 1785, chap. 80, sec. 4, and of 1809, chap. 153, sec. 1; *Stoddert vs. Newman*, 7 *H. & J.* 256, 257; *Glenn, Trustee of Fahnestock vs. Karthaus*, 4 *G. & J.* 381; *Tidd's Pr.* 1176; 1 *Salk.* 52; 1 *Str.* 401; 2 *Str.* 892, 1165; *Barnes' Notes*, 26, 27, 114, 115; *Stat. 8 Hen.* 6, chap. 12; 2 *Archb. Civ.* [Pr. 277; *Buzom vs. Haskins*, 6 *Mod.* 263; *Williams vs. Haskins*, 6 *Mod.* 310; *Vavaser vs. Baile*, 1 *Salk.* 52; 1 *Chit. Pl.* 8, 11.

F. A. Schley, for the appellee. In this case a judgment was rendered in Washington County Court at the November Term, 1822, in favor of John McPherson and John Brien against Dennis O. Byrne, on a single bill, for \$742.37 debt, and \$2,000 damages and costs. John McPherson having died, John Brien, as the surviving obligee, required Mr. Merrick, as his counsel, to have the judgment revived by *scire facias* in his name, and went with his counsel to the clerk's office for that purpose. The counsel searched for and found the original judgment, and directed the clerk to issue a *scire facias* on that judgment, for the purpose of reviving it, as John McPherson was dead. The counsel then entered on the rough original docket, the titling of the case. After doing this, the clerk added to the titling a reference to the amount of the judgment, to wit: "D. \$742.37, and \$2,000 damages, costs \$9.59." As also the number of the case on the docket, and the term of the Court at which the judgment was rendered. Thus—"No. 275, N. C. 1822." The instructions being thus given, and the necessary memoranda thus made by the clerk to guide him in the issue of the writ, the clerk, or one of his deputies proceeded to issue the same. In doing this, an error was committed by issuing in the names of both the plaintiffs in the original judgment, instead of issuing in the

name of John Brien, as the survivor. When the attorney, at the trial Court, discovered this error, he moved to amend the writ, so as to make it in the name of John Brien, as the survivor. After the case had been continued for some time, the original *scire facias* with the sheriff's return thereon, were lost or mislaid, and the case was then continued for a considerable time under the expectation that the lost papers would be found. In the meantime John Brien died, and John McPherson, Junior, having taken out letters of administration on his estate, Brien's death was suggested, and his administrator appeared to the suit, and * then laid the defendant under

168 a rule to shew cause why the lost papers should not be supplied by exact copies, to stand in the place and stead of, and as the originals; as also to shew cause why, when the originals were thus supplied, the writ of *scire facias* should not be so amended as to make it conformable to, and a proper writ on the original judgment for the purpose of reviving it in the name of John Brien as surviving obligee of John McPherson. The Court made the rule absolute, and gave judgment of *fiat* in the name of John McPherson, as the administrator of John Brien, surviving obligee of John McPherson, deceased, for the amount of the original judgment.

In this case it is manifest that the *scire facias* was issued, and intended to revive the original judgment in case No. 275 on the trial docket, at the November Term of Washington County Court, 1822. That particular judgment was laid before the clerk by the attorney for the plaintiff, and the clerk was desired to issue the writ of *scire facias* on that judgment, and he made his memoranda accordingly.

It was therefore the duty of the clerk, with the judgment before him, to issue a proper *scire facias* to revive and give efficacy to that judgment. He ought to have issued a *scire facias* in the name of John Brien, as surviving obligee of John McPherson, deceased, instead of which he issued a *scire facias* in the names of both the plaintiffs, as if they were both still living. The attorney, who is also an officer of the Court, intended that a proper *scire facias* should be issued on the judgment for the purpose of reviving it in the name of John Brien, as the surviving obligee. If therefore there was any error in his entry on the rough original, it was a mere error which the judgment itself, then before him, shewed of itself, and by which it might be amended or corrected.

Only two questions can arise in this case—

1st. Whether the original *scire facias* and sheriff's return thereon being lost, the Court had the power, on being fully satisfied of their existence, contents and loss, of having that loss supplied by substituting copies as originals, and ordering them to be filed *nunc pro tunc*?

169 * 2nd. Whether the papers being thus restored and standing in the same plight and condition as the original *scire facias*

and sheriff's return did at the time of their loss, the Court could make the amendment that they have made?

The first question was waived before the Court below on the part of the defendant's counsel, he considering the loss as a mere accident that might well occur under the practice of counsel, who frequently take out the original papers in a case to examine them, instead of getting copies, and thus saving expense to the parties. The loss or mislaying of the papers was not the fault of the party, but the act of the counsel, who is an officer of the Court, and as such, took out the original *scire facias* and sheriff's return thereon. The counsel for the defendants below, therefore, did not make any objection to the substitution of the copies for the originals. But independent of such assent, the Court would have the power on general principles, and in furtherance of justice, to supply any paper lost from the files of the Court, when satisfied of the loss and contents of such paper. Indeed it would be hard if the Court had no such power. If a bond, or deed, or will is lost, and the loss and contents of such paper can be proved, although the loss was by the act of the party claiming under either of such papers, yet the Courts will enable the party to have the full benefit of such paper in the same manner as if the paper was still in existence and before the Court. In this case a writ was issued by the proper officer of the Court, and was served and returned by the sheriff to the Court, and was fully in possession, and on the files of the Court. It was afterwards either lost or mislaid by either the clerk or the attorney of the plaintiff, both being officers of the Court. It would therefore seem to be essential to the clearest principles of justice, that the Court should have such a control over their own records and papers as to protect suitors from loss from a mere accident of this kind. And that on being satisfied of the loss and contents of any paper that was regularly on the files of the Court, they should have the power to supply its place, if by any means they can do so. In *Chichester & Van Wyck vs. Conde*, 3 Cowen's * Rep. 39, a record of a judgment to be confessed, with the power of attorney to confess the same according to the practice in New York, had been sent by the plaintiff's attorney by mail to the clerk's office at Utica. Supposing that it had reached Utica in time, the plaintiff's attorney caused a *feri facias* to be issued, as though the judgment had been regularly entered at the time it ought to have been. The *feri facias* was levied on the defendant's property, other *feri facias* on the judgments of other creditors were also levied on the property. It was afterwards discovered that the letter to Utica had gone on to the General Post-Office as a dead letter, and long after was returned to the plaintiff's attorney, by which no judgment in fact had been entered up for the plaintiff on which he issued his *feri facias*. On discovering this, the other creditors moved to set aside the *feri facias* of the plaintiff, so that the money might be paid over to them,

or their *feri facias*, which had been regularly issued on judgments regularly obtained. The plaintiff's counsel then moved the Court to allow him to amend by filing the warrant of attorney and record, *nunc pro tunc*, so as to sustain his *feri facias*, and the Court on full argument, allowed the plaintiff to do so, and gave him the full fruits of his *feri facias*. And the Court did it on the principle of furthering justice, and the power of the Court, "where proceedings are conducted in good faith, to fill the chasms that may have intervened through accident or mistake."

This case, in principle, is quite as strong, indeed stronger, than the case under consideration. For in the case in *Cowen* a new judgment was not only entered up, but third parties were affected by it, whereas here, the defendant alone is to be affected. And he is seeking to get rid of the judgment, that he may plead the Statute of Limitations to a new writ of *scire facias*; and therefore entitled to no favor. But it would seem to be unnecessary to multiply authorities on this point of the case, as this Court has recently settled the law. I refer to the case of the *Bank of the United States vs. Lyles et al.* 10 G. & J. 326. He also cited *Stone vs. Overton*, 2 Barnes' Notes, 9; *Needham and Graham*, cited in 1st *Strange*, 140; *King qui tam vs. Bolton*, 1 *Strange*, 140; *Evans vs. Thomas*, 2 *Strange*, 833; *Dayrell vs. Bridge*, 2 *Strange*, 1264; *Bean vs. Elton*, 2 *Strange*, 1077; 7 *Term Rep.* 703; 2 *Arch. Prac.* 231; *Sweetland vs. Beazley*, 1 Barnes' Notes, 6; 2 *Arch. Prac.* 232; 5 *East*, 291; *Braswell vs. Jeco*, 9 *East*, 316; 6 *Cowen*, 607; 2 *Burrow*, 756; *Close vs. Gillespy*, 3 *John's Rep.* 527; *Cox vs. Mundy*, 1 *W. Black.* 492; 7 *Term Rep.* 299; 1 *Term Rep.* 872; 2 *Arch. Ci. Prac.* 244; *Tidd's Prac.* 1038, note (d); *Tidd's Prac.* 982; 2 *Bos. & Pul.* 275, and note; *Campbell vs. Stiles*, 9 *Mass. Rep.* 218; *Burrell vs. Burrell*, 10 *Mass. Rep.* 222; 8 *Hen.* 6, ch. 12; *Braswell vs. Jeco*, 9 *East*, 316; *Sweetland vs. Beasley & Brown*, 1 Barnes' Notes, 6; *Clark vs. Cotten*, 1 Barnes' Notes, 3; 10 G. & J. 326; *Bancroft vs. the Hundreds of Burnham and Stone*, 3 *Levinz.* 348; 3 *Bibb*, 232.

CHAMBERS, J. delivered the opinion of this Court. The only question submitted to the Court, is, whether under the circumstances of this case, the *scire facias* could properly be amended. In principle, this case cannot be distinguished in this respect from the case of *Prather's Terre-Tenants vs. Manro*, 11 G. & J. 261, in which the same question was adjudged. The argument in this case has only tended to strengthen the views there expressed, and we therefore

Affirm the judgment.

* LOUIS MACKALL vs. THE FARMERS BANK OF MARY- 176
LAND.—December, 1841.

The defendant who pleads a discharge under the insolvent laws, upon an issue joined of *nul tiel record*, replied by the plaintiff in the action, must produce before the Court all the proceedings in the matter of his petition for such relief, and show their conformity to the Acts of Assembly in such case made.

The docket entries made by the clerks of the County Courts in such cases, are not equivalent to a record of the proceedings.

Where a judgment is confessed and accepted subject to the defendant's discharge under the insolvent laws, it is not such an admission of his final discharge, as to constitute sufficient evidence of the affirmative of an issue upon the plea of *nul tiel record* of a discharge, joined in a *scire facias* to revive the judgment.

The deed of an insolvent debtor conveying his property to a trustee for the benefit of creditors under the usual order of Court, acknowledged before the clerk of the County Court, is not properly acknowledged.

Where by the docket entries it appeared before judgment confessed, that the defendant's discharge had been suggested, it is no variance that a *scire facias* upon the judgment had been issued without reference to such suggestion.

APPEAL from Prince George's County Court. On the 9th of April, 1835, the Farmers Bank of Maryland sued out upon a judgment a writ of *scire facias*. The judgment recited in the writ was of Prince George's County Court, in favor of the appellee against the appellant, at April Term, 1830; whereof execution, yet, &c. This writ being returned *nihil*, was renewed 20th May, 1835, and then made known. The defendant appeared and pleaded.

1st. Payment of the original judgment before the suing out of the *scire facias*.

2nd. That the plaintiffs ought not to have execution upon their writ, except for such property as the defendant shall hereafter acquire by gift, descent, or in his own right by bequest, &c.; because he, the said defendant, saith, that before the rendition of the judgment in the said writ of *scire facias* mentioned, to wit, on the 6th of April, 1830, he obtained from the Judges of Prince George's County Court a final discharge under the insolvent laws of Maryland, of and from the payment of all * debts; and that the judgment in the writ mentioned, was rendered and obtained, subject to 177 such discharge, and that he hath not since acquired any lands, &c., by gift, &c.

3rd. There is no such record of recovery as that recited in the writ. The plaintiff replied—

To 1st plea: non-payment and issue.

To 2nd plea; that the only discharge which the defendant ever obtained under the insolvent laws, was in 1828; that it was illegal, and that the judgment recited in the writ was not rendered or obtained subject to it, and issue.

To the 3rd plea; there is such a record of recovery, &c., and issue.

Upon these issues a jury was sworn, and the defendant, on motion, was permitted to withdraw his pleas of payment, and of *nul tiel record*, and the Court being of opinion that it did not sufficiently appear that the defendant had been duly and legally discharged under the insolvent laws as by him in his pleas, &c., and as that there was no record of such discharge, adjudged execution to the plaintiff, &c.

1st Exception—At the trial of this cause, the defendant to maintain the issue on his part joined, upon the replication, of the plaintiffs, that there is no such record of the final discharge of the defendant under the insolvent laws of this State, as the defendant in his plea has alleged, proved by the clerk of the Court that no other record of an insolvent's final discharge is ever made in Prince George's County Court, except an entry upon the docket of such discharge, and of the administration of the final oath to the insolvent, and then offered in evidence to the Court, the docket entries in the case of the petition of the defendant for the benefit of the insolvent laws of this State, from which it appeared, that on the 6th day of April, 1830, the defendant appeared in Court, received his final discharge and took the final oath, viz:

"*Louis Mackall for the benefit of the Insolvent Laws.* In Prince George's County Court, April Term, 1830. Petition, &c., schedule, &c. 1829, O. C., petitioner appears * and order of publication
178 extended—1830, April 5th, being 1st day of the term, petitioner appears. 6th, petitioner appears—printers cert. filed, and final oath administered."

Whereupon it was insisted by the plaintiff, that it was incumbent on the defendant to produce before the Court all the proceedings in the case of the petition of the defendant for the benefit of the insolvent laws, from the petition to the final discharge, and to prove their strict conformity to the provisions of the Acts of Assembly in such case made and provided, and the Court being divided in opinion, the issue joined as aforesaid was decided in favor of the plaintiff. The defendant appealed.

2nd Exception—After the evidence offered in the preceding, which is made a part of this exception, the defendant offered to the Court the judgment, to revive which the *scire facias* in this Court is brought, and proved by the docket entries that said judgment was confessed by the defendant on the 22nd April, 1830, subject to his discharge under the insolvent laws; and the defendant insisted, that the acceptance by the plaintiff of the judgment now sought to be revived, subject to the defendant's final discharge, was an admission of such final discharge, and sufficient for the affirmative of the issue

of *nul tiel record* aforesaid; but the Court [STEPHEN, C. J., and DORSEY, A. J.,] were of opinion that said entry was not sufficient for the purpose aforesaid. The defendant appealed.

3rd Exception.—In addition to the evidence contained in the preceding exceptions, which are by agreement made part of this exception, the defendant further to maintain the issue joined on his part, upon the replication of *nul tiel record* of the defendant's final discharge under the insolvent laws of this State, offered in evidence to the Court, the original papers in the case of the petition of the defendant for the benefit of said insolvent laws, by which it appeared that the petitioner's deed to his trustee, made at the time of his application, the 23rd October, 1828, for relief, was certified to be acknowledged in open Court before the clerk of the Court.

Whereupon the plaintiff by his counsel objected to the reading * of the deed from said defendant to Edmund Key, his trustee, upon the ground, that the same does not appear to have been acknowledged according to law. And the Court being of opinion that the said deed had not been properly acknowledged, sustained the plaintiff's objection, and refused to admit such deed to be read in support of the issue aforesaid. The defendant appealed. 179

4th Exception.—The plaintiff to maintain the issue joined on his part to the plea of *nul tiel record*, produced in evidence the docket of Prince George's County Court of April Term, 1830, being the docket of the term at which the said judgment was rendered, and offered the entry of said judgment on the docket of said term, and which is in the words following, to wit:

"The President, Directors and Company of the Farmers Bank of Maryland vs. Louis Mackall. Prince George's County Court, April Term, 1830. Case—nar.—rule—plea—Defendant's discharge under the insolvent laws suggested—22d April, Judgment for \$700, current money, damages and costs. The damages to be released on payment of \$350, current money, with interest from the 16th day of July, 1828. Costs \$7.28½."

The defendant then objected, that the judgment set out in the *scire facias* did not correspond with the said judgment so offered by the plaintiff in this; that the said *scire facias* does not recite the suggestion of the defendant's discharge under the insolvent laws, according to the entries on the said docket, and that there was a variance between the said *scire facias* and the judgment as entered on the docket aforesaid; but the Court were of opinion and so decided, that said entry on the docket of defendant's discharge suggested, constituted no variance between the judgment as recited in the *scire facias*, and proved. The defendant appealed.

The cause was argued before BUCHANAN, C. J., ARCHER, DORSEY, and CHAMBERS, JJ.

T. G. Pratt, for the appellant, insisted: 1. That under the plea of his discharge under the insolvent * laws, it was sufficient for
180 the insolvent to prove his final discharge, and that it was not incumbent on him to exhibit the preliminary proceedings under his insolvent petition.

2. That the order of the Court awarding to the appellant a final discharge under the insolvent laws, was an adjudication by the Court of the regularity of all the antecedent proceedings, which cannot be collaterally enquired into.

On the 2d exception, it will be insisted—

1. That the record shews that the issue joined on the plea of *nul tiel record* of plaintiff's judgment, was decided by the Court, and that the second exception was taken to the opinion of the Court thereon.

2. That the entry on the judgment, "subject to the defendant's discharge under the insolvent laws," or "defendant's discharge under the insolvent laws suggested," constituted a part of the judgment, and that the omission to recite the same in the *scire facias*, was fatal upon the plea of *nul tiel record*.

3. That the acceptance of the judgment, subject to the defendant's final discharge, was an admission of such final discharge, and sufficient to bar the plaintiff's right of execution, as against the property of the defendant, subsequently acquired by purchase, &c.

On the 3d exception, it will be insisted—

That the property of the insolvent was transferred by operation of law to his trustee; that the deed from him to his trustee was consequently unnecessary; and that the Court erred in deciding that his discharge was irregularly obtained and void, because of the supposed insufficiency of the acknowledgments of said deed.

On the 4th exception, it will be insisted—

That the omission in the *scire facias* "to recite the suggestion of the defendant's discharge under the insolvent laws," was fatal to the plaintiff's recovery under the issue joined on the plea of *nul tiel record*, to sustain which the said judgment was offered in evidence by the plaintiff.

Tuck and Randall, for the appellees, contended: * 1. That to
181 support this issue it was incumbent on the defendant to produce the whole record of the insolvent's proceedings, and show by them a strict compliance with the Acts of Assembly; that these docket entries in themselves are no evidence at all, unless preceded by such regular proceedings.

On the 2d exception—

2. That the plea of *nul tiel record*, as to the judgment in the *scire facias* stated, was, on leave granted to the defendant by order of Court withdrawn, and therefore no such prayer as that contained in this bill of exceptions could be made, there being no foundation for it in the pleadings.

3. That if the Court could entertain such a prayer, they were correct in rejecting it, because the docket entries cannot control the original record of the judgment, which does not appear to be, nor is pretended to be, rendered subject to this discharge.

4. That if so rendered subject to this discharge under the insolvent laws, advantage of this discharge could not be taken by the plea of *multiel record*, &c.; but the discharge must be specially pleaded, and the whole proceedings fully set out and shown to be in conformity to the law.

On the 3d exception.—

5. That the deed is not acknowledged according to law; its acknowledgment being in open Court before the clerk thereof.

On the 4th exception.—

6. That this suggestion of the defendant's discharge under the insolvent laws is a mere docket entry, no part of the judgment, and its omission in the judgment, does not constitute a variance.

The plaintiffs will also support the opinion of the Court on this exception by the points made under the first exception.

BY THE COURT—

Judgment affirmed.

* JOHN MURPHY'S Lessee vs. AMOS CORD.—December, 1821.
1841.

D. on the 6th February, 1822. executed a mortgage of a tract of land to M. to secure a debt due him. On the 12th March, 1821, T. recovered a judgment at law in the county where the land lay, against D.; but not having sued out execution within a year and a day, on the 21st February, 1823, issued a *scire facias* to revive his judgment. On the 9th March, 1824, obtained a *fiat* and a *feri facias* on the 6th April following. Under this writ, the mortgaged premises were levied on, and sold. *Held*, that the mortgagee could not maintain ejectment against the purchaser (a)

As against a mortgage, executed within a year and a day after the rendition of a judgment at law, the lien of a judgment will prevail, though the plaintiff has occasion from lapse of time to revive his judgment before he can sue out execution. (b)

A levy upon "part of a tract of land called P. containing, &c. more or less, which is now in the possession of D." upon a *feri facias* against D. is sufficient to identify the property. (c)

(a) Under Rev. Code, Art. 64, sec. 183. amended by the Act of 1884, c. 178, an execution or attachment may issue on all judgments and decrees at any time within twelve years from the date of the judgment or decree.

(b) Cited in *Anderson vs. Tydings*, 8 Md. 443; *Manton vs. Hoyt*, 43 Md. 265; *Duwall vs. Speed*, 1 Md. Ch. 236; *Hayden vs. Stewart*, *Ibid*, 164; *Hodges vs. Sevier*, 4 Md. Ch. 384.

(c) Approved in *Jarboe vs. Hall*, 37 Md. 350.

Upon a *scire facias* to revive a judgment against the original defendant, the alienees of his land after the judgment within a year and a day, need not be made parties, for the purpose of enabling the plaintiff to levy upon such lands, under his revived judgment. (d)

APPEAL from Harford County Court. This was an action of ejectment brought by the appellee on the 21st day of January, 1835, to recover a tract of land called Palmer's Forest. The defendant pleaded not guilty and took defence on warrant. The case was submitted to the County Court on the statement of facts.

It is admitted, that one John Dallam was lawfully seized in fee, before and on the 12th March, 1821, of the premises described in the declaration, and so continued until the 6th of February, 1822, when being indebted to John Murphy, he executed to him a deed of mortgage for Palmer's Forest, to secure such debt, and payment of the interest thereon half-yearly, the principal being payable on or before the 6th February, 1824. This mortgage was duly acknowledged and recorded.

It was further admitted, that on the 12th March, 1821, John Thompson and Thomas Wilson recovered a judgment against the said John Dallam, in Harford County Court, where the said tract lies, for \$719; that on the 21st day of February, 1823, a * *scire* **183** *facias* was issued on the said judgment in the same County Court, and on the 9th March, 1824, obtained a *fiat executio* thereon. That on the 6th April, 1824, a *feri facias* was sued out, which was levied upon:—

“Part of a tract of land called Palmer's Forest, containing 325 acres, more or less; also, part of one other tract of land called Fox Harbor, containing, &c., all which said land is now in the possession of the said John Dallam.”

The writ of *feri facias* was returned to the Court 7th May, 1824, “sold all the right of John Dallam in and to all the lands mentioned and described in the schedule filed with this writ, to William D. Lee, for \$1,741.09, &c., and satisfied plaintiff's attorney.”

The sheriff's deed, dated 4th October, 1824, to William D. Lee, duly acknowledged and recorded, was also admitted. And on the 12th May, 1824, the said Dallam surrendered possession of the said tract to the said W. D. Lee, who continued in possession of the same until his death in August, 1828, having devised the same to his two sons, John and Alfred, who leased the same to the appellee.

It was further admitted, that on the 25th June, 1836, the late sheriff of Harford County, by his deed, reciting that some doubts existed as to the effect of his deed of 7th May, 1824, conveying title to W. D. Lee, made a second conveyance to the said John and Alfred Lee, of the land levied and sold by course and distance.

(d) See *McElderry vs. Smith*, 2 H. & J. 62.

And it was agreed, that if upon the foregoing statement of facts the Court should be of opinion, that the plaintiff is entitled to recover, then judgment to be entered up for the plaintiff, otherwise judgment to be entered for the defendant, with liberty to both parties to appeal.

The County Court rendered judgment for the defendant, and the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, CHAMBERS, and SPENCE, JJ.

* *H. Archer*, for the appellant, insisted: 1st. That the sale made by the sheriff passed no title to the purchaser, because 184 the proceedings do not describe with sufficient legal certainty the premises levied upon and sold. *Thomas vs. Turvey*, 1 H. & G. 435; *Williamson vs. Perkins*, 1 H. & J. 452; *Clarke vs. Belmear*, 1 G. & J. 443, 448.

In the argument upon this point in relation to the defective description of the property, it was objected—

1st. That the second deed made by the sheriff on the 25th day of June, 1836, and the paper executed on the 12th May, 1824, by the defendant in the judgment to the purchaser, and the act of the defendant professing to transfer the possession, are each and all of them, inadmissible as evidence to cover the defect in the description of the property contained in the levy and proceedings under the *fiery facias*, and cannot be used for the purpose of identifying the land sold, and—2d. That if such evidence be admissible, it cannot have the effect of remedying the insufficiency of the levy, return and first deed made by the sheriff, in which the property seized, sold and conveyed, is described as “part of a tract of land called Palmer’s Forest.”

Again, the *fiery facias* was exhausted many years since, and the power under it cannot now be exercised anew. The purchaser must see that the proceedings are right, and this within a reasonable period. The return, if amendable, must be amended on motion and leave of the Court. How far back will the Court go on such a motion? What sort of leave will they grant? The Act of 1813, chap. 102, sec. 4, relates to omissions by the selling sheriff to make any deed. It does not affect those cases where a defective deed has been delivered, and give power to heal that. Amendments to sheriff’s proceedings must be made while his proceedings are *in fiery*. *Waters vs. Peach*, 3 G. & J. 408.

Hence his second deed of June, 1836, was too late. Nor can it escape the Court, that the practice here attempted, if sanctioned, would lead to many abuses.

* 2nd. That if the sale made by the sheriff was not void owing to the insufficiency of the description of the property, 185 it could pass no title as against the appellant, because he was not

made a party to the proceedings, or warned as the tenant, under the *scire facias* which issued to revive the judgment after he had acquired title to the property.

Where a *scire facias* issues, every person having an interest in the land must be made a party. *Arnott & Copper vs. Nicholls*, 1 H. & J. 471; *McEldery vs. Smith*, 2 H. & J. 72; *Hanson vs. Barnes*, 3 G. & J. 365; 2 Harr. Ent. 749; 7 Law Lib. 136.

3rd. That if the sale made by the sheriff was valid, and no *scire facias* warning the appellant necessary, still it will be insisted, that the deed under which the appellant claims, conferred a title paramount to that acquired by the purchaser at the sheriff's sale. That after the lapse of the period within which Johnson and Wilson might have issued execution on their judgment, but neglected to do so, its lien was suspended, and the mortgage to the appellant Murphy obtained priority.

The mortgage in this case under the circumstances, is the principal lien. Lapse of time here, is the loss of the lien. This lets in the mortgagee. The *scire facias* is a new judgment. This is the consequence of its being a new action. *Gonnegal vs. Smith*, 6 Johnson, 106; *Norton vs. Beaver*, 5 Ohio Rep. 180; *Soriba et al. vs. Deanes et al.* 1 Brocken. 167.

The lien co-exists with the right to issue execution; when the right to issue execution is gone, the lien is gone. *Eppes vs. Randolph*, 2 Call, 152; *Miller vs. Allison*, 8 G. & J. 35; *Rankin vs. Scott*, 12 Wheaton, 177; *Gilb. on Ex.* 12; *Berry vs. Griffith*, 2 H. & G. 337; *Duvall vs. Waters*, 11 G. & J. 37; *Tucker's Nos. on Black.* 418.

A. W. Bradford, for the appellees. This was an action of ejectment instituted in Harford County Court, on the 21st day of January, 1835, by the appellant against the appellee, to recover a tract of land called * "Palmer's Forest." The defendant appeared at **186** March Term, 1835, under the common rule, pleaded not guilty and took defence on warrant. A warrant of resurvey thereupon issued, and plots were returned, after which the plaintiff and defendant filed a written statement of facts, from which it will appear—

That the appellant claims title to the premises in question, under a mortgage from one John Dallam, the former owner of the land in question, dated on the 6th of February, 1822, with a condition annexed, that the same should be void on payment of \$1,250, on or before the 6th February, 1824, and which has not yet been paid.

It will further appear, that the said John Dallam, (the former proprietor, and under whom both appellant and appellee claim title,) was lawfully seized in fee of the premises in question, on and before the 12th March, 1821; on which day a judgment was rendered against him in Harford County Court, at the suit of a certain Johnson and Wilson, which was afterwards revived by *scire facias*, issued on the 21st February, 1823, and a *fiat* thereon entered on 9th March, 1824.

That a *feri facias* issued on the said judgment so revived on the 6th April, 1824, under which the sheriff levied on the said land called "Palmer's Forest," and made the following return—"7th May, 1824, sold all the right of John Dallam, in and to all the lands mentioned and described in the schedule, filed with the writ to William D. Lee for \$1,741.09, and satisfied plaintiff's attorney \$1,102.17, exclusive of commissions, and satisfied sheriff the residue."

And the schedule referred to and returned with said *feri facias*, described the lands so sold by the sheriff, as follows: "Part of a tract of land called 'Palmer's Forest,' containing 325 acres, more or less; also part of one other tract of land called 'Fox Harbor,' containing 27 acres, more or less. All which said land is now in the possession of the said John Dallam, appraised to \$12 per acre."

It will also appear, that on the 12th May, 1824, (five days after the sale,) the said John Dallam, (the defendant in said *feri facias*, and the party in possession of said land,) * surrendered the complete possession thereof to the said Lee, the purchaser, and 187 executed at same time a formal deed of surrender of the land so sold, describing said tract therein as "the farm on which I now live, called 'Palmer's Forest,' containing 320 acres of land, more or less;" that said Lee, the purchaser, continued in possession thereof from that time until his death, which happened in August, 1828; that said Lee, before his death, duly made his last will, and devised the said land to his two sons, John B. Lee and Alfred B. Lee; and that the appellee, as the tenant of said devisees, has been in possession of said land from the death of said William D. Lee to this time. It will also appear, that the said sheriff, on the 4th October, 1824, executed a deed to said Lee, the purchaser; and that on the 25th of June, 1836, the said sheriff executed another deed to the said devisees of the said Lee, for the purpose of conveying said land by a more accurate and certain description; and therein the said land was fully set out and described by courses and distances.

The County Court thereupon gave judgment for the appellee, who will insist that the same should be affirmed for the following reasons:

1st. Because the said William D. Lee, under whom the said appellee claims, purchased the said land under a *feri facias* duly issued and executed, on a judgment older than the mortgage under which said appellant claims.

As to the character of the lien on lands at common law arising from judgment, 2 *Cru. Dig.* 73; and that the execution relates to the judgment. 1 *Comyn Dig.* 245, *Ex. Letter D*; 2 *Saunders R.* 8, *note k*.

A *scire facias* is not a new action. It is a judicial writ founded on matter of record. A release of all executions is a good bar to a *scire facias*. In no case where the original defendant is alive; where there is no Act by law divesting him of all his rights, as in bank-

rupture or marriage, has it been held necessary to warn any person claiming a part of the defendant's property to come in and defend a *scire facias*. A *terre-tenant* need not be warned in conjunction with the original defendant. *The defendant's interest must be
188 gone and extinguished entirely, before other parties are to be brought in. 2 *Saun. Rep.* 72, note y. Death is the only case in which a *terre-tenant* is necessary on a *scire facias*. 13 *Law*, 54; 2 *Bin.* 228; *Wilson vs. Watson*, 1 *Peter C. C. R.* 269, contains a lucid review of the English cases on this subject. 7 *Law Lib.* 136, 137; 13 *Law Lib.* 69; *Jackson vs. Bartlett*, 8 *John.* 361; *Barney vs. Patterson*, 6 *H. & J.* 204.

2nd. That the sheriff's return of said sale, accompanied as it was by the immediate transfer of possession, and the other circumstances identifying the land sold, is not so defective as to avoid the sale, and authorize the appellant to recover the land in this action.

The sheriff's return is not incurably defective, but is sufficient *per se*, to pass the title. The land is identified by the words actual possession of John Dallam. This makes the return certain. Actual possession may be located and conveyed. *Fenwick vs. Floyd*, 1 *H. & G.* 172; *Berry vs. Griffith*, 2 *H. & G.* 337; *Clark vs. Belmear*, 1 *G. & J.* 444.

3rd. That if the said return is so defective, any such defects are abundantly healed by the two deeds which said sheriff subsequently executed. *Estep & Hall vs. Weems*, 6 *G. & J.* 303; *Carroll vs. Norwood*, 5 *H. & J.* 173.

R. Johnson, also for the appellee, insisted: 1. That the sheriff's sale duly returned gives the purchaser title.

2. Whatever is levied upon, however insufficient in description, may be sold, and the description amended by the subsequent proceedings; from these principles it results:

3. That the purchaser may look at all the proceedings emanating officially from the sheriff. He may look at the return to this *feri facias*. The return to the *venditioni exponas*: and lastly, to the deed, whenever executed. The purchaser does not claim under the deed, but under all the proceedings, to identify what was originally seized.

*4. The purchaser's title is a judicial conveyance. The
189 deed when it is a judicial conveyance, comprises all the proceedings from judgment down. The whole constitute the conveyance. It is valid or invalid, on the ground of uncertainty, like all other conveyances.

Is not the title sufficient under the return of the *feri facias* alone? Its language is sufficient to validate a deed between parties. The action is brought for Palmer's Forest. It is sufficiently identified by the return that on principles of location, the purchased part might be located. The degree of certainty depends upon the fact of whether, with the description the parts sold can be located. A part of that tract was certainly purchased.

Who has the paramount title to that part—the part “now (then) in the possession of John Dallam.” If those words exclude all other portions of Palmer’s Forest, except the 325 acres claimed, then it is conceded that they refer only to the part in his possession. The 325 acres are then identified. The question is the same as on a deed from John Dallam. If he had so conveyed the part, could it be located? If ambiguity arises upon matter out of the return or deed, it may be cleared up by proof. There is no evidence to show the contents of Palmer’s Forest; nor proof of any more land in his possession. Dallam admits by his deed that Lee purchased all of Palmer’s Forest, which he Dallam then had. The plaintiff’s own title is a conveyance; is for just the same quantity of 325 acres. All the proof confirms the fact that 325 acres were in the possession of Dallam. The title is to be reasonably construed; and it is to be presumed the sheriff acted rightfully. This is for the advantage of both parties. Before this return can be vacated, the Court must interpolate words giving it another meaning. Under ordinary construction, it is certain enough. It is a seizure of what defendant had in his possession. Every word of the return must have its appropriate meaning. Then why did the return speak of possession at all? Why describe the part taken as, in possession—but for identification. If that be so, there is an end of this question. *Thomas vs. Turvey*, 1 H. & G. 435.

* If there was any defect, then it was cured by the deed of 1836. It professes to be a deed of confirmation. In 1 H. & G. 190 174, this Court says: “The sale may be proved by deed—or a return—or a memorandum to take the cause out of the Statute of Frauds.” In 1 H. & G. 439, the question is put on the ground that affects an ordinary conveyance. That case does not exclude the right, to look at other proceedings than the return. There must be some written evidence of title. But the title itself depends on the fact of purchase. It does not decide that, all matters *dehors* is excluded from the consideration of the Court; but that the particular matter, *dehors* relied on in that case was not sufficient. Not to be explained by matters *dehors*, means *dehors* in a legal sense. *Clark vs. Belmear*, 1 G. & J. 444; *Hanson vs. Barnes’ Lessee*, 3 G. & J. 359, 368, 369.

The return was evidence of the sale; there was also a deed; both were sufficient. In *Estep and Hall vs. Weems*, 6 G. & J. 303, an insufficient return on a valid sale, may be corrected by deed at any time, as legal evidence of the title. *Barney vs. Patterson*, 6 H. & J. 182, 204.

The law will not suffer the sheriff to do any thing to defeat the title. If the levy is certain on its face, or refers to something certain, it is sufficient. *Nesbit vs. Dallam*, 7 G. & J. 484.

The purchaser may look to the sheriff’s deed as well as to other portions of the papers returned.

Then is there any limitation of time, beyond which a defect may not be cured?

There is no injustice as to the intermediate incumbrancer, for equity would protect him, if an innocent purchaser without notice.

What is the case as between the defendant at law, and the purchaser of his property. He has the purchaser's money; for it has paid his debt. It is, as if he had bought from the defendant; as to him, there ought to be no limitation of time.

If the Court would now oblige the sheriff to correct his return, and make it conform to the truth, it would seem strange * that he
191 may not now do it voluntarily, for the purposes of this action. The Court will enforce that done by the sheriff which they would have ordered him to do. There is no limitation but the officer's life.

This judgment is a prior lien. The case in 3 *Bland*, 323, 324, as to effect of lien, is doubted. The Act of 1785, chap. 80, sec. 7; 1798, chap. 101, sec. 8, sec. 17, show the Chancellor's error as to judgments not being liens in Maryland, after a year and a day, or after three years. Questions of priority are settled by the dates of judgments. But the rule relied on at bar determines the question, not with reference to the date, but with reference to the right to sue out immediate execution. 2 *Tidd's Pr.* 1152; *Hanson vs. Barnes*, 3 G. & J. 359. This lien springs from the judgment, not as an incident.

Besides our lien was in full force when the Dallam mortgage was executed in February, 1822. We could then have executed without notice to his mortgagee. This is clear, and the defendant could not delay us by reason of that mortgage, *Wintringham vs. Wintringham*, 20 *John.* 296; *Taylor vs. Thompson*, 5 *Peters*, 372.

Constable, for the appellant, in reply. The sheriff's final deed is evidence of the due execution of the power, and it is conclusive on that execution. His further acts are void.

The Maryland law is fully decided with the appellant on his second proposition. *Ridgely vs. Gartrell*, 3 H. & McH. 450; 2 *Harr. Ent.* 763. The original defendants and *terre-tenants* are joined in a *scire facias*. *McEldery vs. Smith*, 2 H. & J. 72.

The lien expires with the right to sue out execution. *Eppes vs. Randolph*, 2 *Call*, 152; *Gilb. Ev.* 12; *Nimmo Ex. Commonwealt.* 4 *Hen. & Mun.* 68; *Scriba et al. vs. Deane et al.* 1 *Brock*, 169; *Rankin and Schatzell vs. Scott*, 12 *Wheat.* 177; 5 *Cond. Rep.* 506; 2 *Brock.* 253; *Lee et al. vs. Stone and McWilliams*, 5 G. & J. 19; *Miller vs. Allison*, 8 G. & J. 38; *McMechen vs. Marman*, *Ib.* 73.

BY THE COURT.

Judgment affirmed.

192 * NOTE.—By the Act of 1828, ch. 194, passed 19th February, 1824, it is enacted, "That on all judgments hereafter to be rendered in

any County Court, or by any Justice of the Peace, or in the Court of Appeals, a *fiert facias* or *capias ad satisfaciendum* may issue at any time within three years from the date of such judgments.

G. W. DORSEY vs. SHEPPARD and Wife, and SEARS.—December, 1841.

Nuncupative wills are not favorites of the law. (a)

The *factum* of a nuncupative will must be proved, by evidence more strict, and stringent, than that of a written one. (b)

The testamentary capacity, and the *animus testandi*, at the time of the alleged nuncupation, must appear by the clearest, and most indisputable testimony.

A will made by interrogatory, may be valid; but when so made, the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity, and volition, than it would be in an ordinary case. (c)

A nuncupative will which contains no bequests, which merely appoints an executor, is not subject to the operation of the Statute of Frauds in relation to such testaments; nor to that of the Act of 1810, chap. 84.

A written will, by the Statute 12 Car. 2, chap. 24, is indispensable to the appointment of a testamentary guardian.

When the want of mental capacity to make a will, is urged as the ground of objection to the probat of a nuncupation, it is the duty of the party offering such will, to prove such capacity by the clearest testimony.

Where the testimony leaves the mind in a state of doubt as to the capacity of the testator to make a nuncupative will, it is the duty of the Orphans' Court not to admit it to probat.

Where a nuncupative will is drawn from the decedent by interrogatories, full and clear proof of spontaneity of the *animus testandi* is indispensable.

APPEAL from the Orphans' Court of Calvert County. Caveat by the appellees against the admission to probat of the nuncupative will of Hezekiah Coberth.

The appellant moved the Court to admit the testimony of the subscribing witnesses to a paper or instrument of writing, purporting to be the nuncupative will of H. Coberth, deceased, and which paper was as follows:

"We, the undersigned, certify, that Mr. Hezekiah Coberth, on the morning of the 28th October, 1841, said in our * presence, that he wished Dr. George W. Dorsey to act as trustee for **193**

(a) By the Act of 1884, c. 293, it is provided that no nuncupative will shall hereafter be valid in this State; but any soldier, in actual military service, or any mariner, being at sea, may dispose of his movables, wages, and personal estate as heretofore.

(b) Cited in *Hammett vs. Shanks*, 41 Md. 219.

(c) Cited in *Biddle vs. Biddle*, 36 Md. 644.

his son, to be his administrator, and to use his own words, he wished him to be his general agent; he moreover, said, he intended it to be his last will.

J. A. SEDWICK.

LOCH L. WEEMS,

JAMES WILLIAMS,

JAMES M. SOLLERS."

To this paper was attached an affidavit, made before two justices of the peace of Calvert County, by all the witnesses thereto, that the deceased did make the above statement in their presence, and at the time of making the same, he was of a sound and disposing mind, to the best of their knowledge and belief.

The paper and deposition were offered for the purpose of proving as well what was the last will and testament of the deceased, as for explaining the said paper.

The caveators objected—

1. That the said paper was not in the form required by law.
2. That it cannot be construed as the appointment of a guardian or executor.
3. That the same is not attested and proved according to law.
4. That the same was procured at the instance, and by the solicitation, importunities, and request, of persons present at the time, which the testator was too weak to resist.

The Orphans' Court, after hearing both parties, ordered the prayer of the motion to be granted, and then proceeded to take the following proof:

The deposition of Dr. John A. Sedwick, of lawful age, after, &c., deposeth and saith, that the morning on which Mr. Hezekiah Coberth died, he, together with Dr. L. L. Weems, as attending physicians, thought it their duty to suggest to Mr. Hezekiah Coberth, that if he wished to make any arrangement of his affairs, that was the proper time, as he had no time to lose, they having understood that he intended to do so; when he replied, that he wished to make some arrangement, but wanted some little rest before doing so, and

194 after * being reminded by Dr. L. L. Weems, that if he wished to do any thing respecting his affairs it could be made valid. Mr. Hezekiah Coberth then cast his eyes around and called for Dr. George W. Dorsey, the individual mentioned in the paper purporting to be his nuncupative will. We thought he was about to speak, but he did not at that moment. He, the deponent, then asked Mr. Hezekiah Coberth if he wished Dr. George W. Dorsey to take care of his child, and at the same time asked Mr. Hezekiah Coberth if he wished him, Dr. Dorsey, to be trustee to his child, and he answered in the affirmative to both. This deponent then asked him if he wished Dr. George W. Dorsey to be his administrator, to which he answered yes, and added, general agent. There was then a little pause, after which Dr. L. L. Weems asked if he wished it to be his last will, to which he first nodded assent, and afterwards said yes, which was

said distinctly, and emphatically spoken. This deponent further says, that Dr. George W. Dorsey is the same individual mentioned in the paper referred to. This deponent further says, that the reason why he mentioned this subject to Hezekiah Coberth was, his having heard him during his illness express a wish to make some arrangement respecting his affairs; that they were not at that time as he wished, and that he wished that they, Dr. L. L. Weems and himself, should do something for him, as he wished to recover or recruit, to make some arrangements; and that at the time he, Mr. Hezekiah Coberth, made this declaration, he was perfectly sane, and the aforementioned words, purporting to be his last will, were spoken by Mr. Hezekiah Coberth in the presence of him the deponent, Dr. L. L. Weems, James M. Sollers and James Williams; and that they were spoken in his last illness and in his own house and place of residence; and that he this deponent was called to Mr. Hezekiah Coberth, Saturday previous to his death, and that the words expressive of a disposition to make some arrangement were spoken a part on Monday and a part on Tuesday or Wednesday; and further this deponent saith not.

Deposition of Dr. Loach L. Weems, of lawful age, being **195**
 *duly sworn on, &c., deposeth and saith, that he was called to see Mr. Hezekiah Coberth on Monday afternoon about two o'clock. On Thursday morning he found him in a dying condition, but perfectly rational. He this deponent stated to Dr. John A. Sedwick, that it was his duty to ask Mr. Hezekiah Coberth if he did not wish to make some arrangement, and that Dr. John A. Sedwick mentioned this to him, and Mr. Hezekiah Coberth replied, that he wanted about one hour's rest, that he was very much fatigued. This deponent then observed that if he, Mr. Coberth, wished to make any provision for his little son, that was the time, and rest afterwards. He, this deponent, further stated to Mr. Hezekiah Coberth, that any arrangement that he wished could be attended to for him afterwards, and that James M. Sollers and James Williams then assembled around his bed, and that this deponent and Dr. John A. Sedwick were already at the bedside. That Dr. George W. Dorsey came to the bedside also, and that he is not satisfied that he was called by Mr. Hezekiah Coberth or not; that then Mr. Hezekiah Coberth took hold of Dr. George W. Dorsey's hand; he then asked him if he wanted him, and Mr. Hezekiah Coberth then stated, using his own phrase, I wish you to be trustee to my little son and my general agent. He this deponent, then asked Mr. Hezekiah Coberth, whether, in the event of its being necessary, did he wish Dr. George W. Dorsey to administer on his estate, to which he replied yes, and general agency. Dr. John A. Sedwick then asked him whether he wished us the said witnesses, to witness this to be his last will and testament. He first gave assent by nodding his head, and then said, I do; and that he, this deponent, was certain that Mr. Hezekiah Coberth heard them,

and that the words aforesaid were spoken in his last illness, and in his own house and his place of residence, and in the presence of this deponent, James M. Sollers, Dr. John A. Sedwick and James Williams, who were all standing around his bedside at the time. And the said deponent further saith, that Dr. George W. Dorsey married the daughter of Hezekiah Coberth, deceased, which daughter died without issue previous to the * death of the said Hezekiah Coberth, and the said Hezekiah Coberth had a peculiar way of expressing himself; and further this deponent saith not.

The deposition of James M. Sollers, after, &c., deposeth and saith, that he was sent for by Dr. George W. Dorsey to see Mr. Hezekiah Coberth. After being there some time Dr. L. L. Weems and Dr. John A. Sedwick came in some time after they had been there. Dr. John A. Sedwick asked Mr. Hezekiah Coberth if he did not wish to see Mr. James A. Bond to do some writing or business for him; he answered he did, but he wished some rest. Dr. L. L. Weems then said to Mr. Hezekiah Coberth, you had better say what you wish to say, and rest afterwards. He, Mr. Hezekiah Coberth then looked round and asked for Dr. George W. Dorsey, who was at that time setting on the small bedside; he arose and went to the bedside of Mr. Hezekiah Coberth, and he then reached out his hand and caught Dr. George W. Dorsey by the hand; he then asked what he wanted, and he said he must rest. Dr. L. L. Weems then said to Mr. Hezekiah Coberth, I would not put it off, sir; whatever you wish to say, say it in our presence and it shall be attended to. He then said something in an indirect tone which he this deponent did not understand. Dr. L. L. Weems then asked Mr. Hezekiah Coberth if he wished Dr. George W. Dorsey to be guardian to his little son, and his reply was yes, distinctly; and after some pause he Mr. Hezekiah Coberth said general trustee; and he was then asked by Dr. L. L. Weems if he wished Dr. George W. Dorsey to administer on his estate, and he then replied yes; and after a pause, my general agent, And Dr. John A. Sedwick then asked Mr. Hezekiah Coberth if he wished us, the witnesses, to consider this his last will and testament. He Mr. Hezekiah Coberth then nodded his head and said yes; and that this conversation was during the last illness of Mr. Hezekiah Coberth, and at his house and his place of residence, and in the presence of this deponent, and James Williams, Dr. John A. Sedwick and Dr. L. L. Weems, all of whom were standing around his bedside at that time. This deponent believes that Mr. Hezekiah Coberth was rational at the time; and further this deponent saith not.

197 *The deposition of James Williams, after, &c., deposeth and saith, that on Thursday morning he visited St. Leonards, and hearing of Hezekiah Coberth's illness, he went to see him, when Dr. Loch L. Weems, who was then present at the time, said to Mr. Coberth, whilst he this deponent was present, that any request that he Mr. H. Coberth would make before these gentlemen would be

just as good as a will, and Mr. Coberth replied yes. Mr. Coberth then called for Dr. George W. Dorsey, and the Doctor then took hold of his hand; when Dr. John A. Sedwick or Dr. Loch L. Weems asked Mr. Coberth if he wished Dr. George W. Dorsey to take care of his child, or to be his administrator; and at the same time Dr. Loch L. Weems asked Mr. Coberth if he considered that to be his last will and testament, and he nodded assent and said yes; and that the words purporting to be his last will were spoken during the last illness of Mr. Coberth, and at his house, and in the presence of this deponent, Dr. John A. Sedwick, Dr. Loch L. Weems and James M. Sollers, who were all standing around his bedside at the time, in his house and his place of residence; and further this deponent saith not.

The deposition of Thomas Edmonds, after, &c., deposeth and saith, that he knew Ann and Elizabeth Coberth to be sisters of the half-blood to Hezekiah Coberth; and that they removed to the City of Annapolis some years ago; and that one of them married a Mr. Sears, and the other a Mr. McNeir; and further this deponent saith not.

The deposition of Jesse J. Dalrymple, after, &c., deposeth and saith, that he heard Mr. H. Coberth, in his life-time say, that the mother of the McNeirs was his sister; and further this deponent saith not.

The deposition of William H. Tuck, after, &c., deposeth and saith, that he knew Basil Sheppard and Elizabeth, his wife, of Annapolis; and that Elizabeth Sheppard is the mother of George and William McNeir, both of whom he has heard say that their mother and Mrs. Ann Sears are sisters of the half-blood of the late Hezekiah Coberth; and further this deponent saith not.

* The Orphans' Court having heard the parties by their counsel and duly considered the testimony in the case, do **198** adjudge, order and decree, that the said paper offered for probat as the nuncupative of the said H. Coberth be and the same is hereby rejected, and ordered not to be admitted to probat as his will.

From which decree the said George W. Dorsey appealed.

It was agreed in the Appellate Court to amend the record so as to show that it was in proof in the Orphans' Court, that the deceased Coberth, died possessed of personal property of the value of several thousand dollars.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

Sollers and S. Pinkney, for the appellant. *Tuck and Alexander*, for the appellees.

DORSEY, J. delivered the opinion of this Court. Nuncupative wills, though tolerated, are by no means favorites of the law. Independent of the Statute of Frauds altogether, the *factum* of

a nuncupative will requires to be proved by evidence more strict and stringent, than that of a written one in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended. Facilities which absolutely require to be counteracted, by Courts insisting on the strictest proof as to the *facta* of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in this case of a nuncupative will, by the clearest and most indisputable testimony.

. See *Lemarna vs. Bonsal*, 2 *Eng. Eccl. Rep.* 147; 1 *Williams on Executors*, 62, and the case of *Priscilla E. Yarnall's Will*, 4 *Rawle's Rep.* 62. A will made by interrogatories is valid; but undoubtedly whenever a will is so made, the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition, than it would be in an ordinary

199 * case. 1 *Eng. Eccl. Rep.* 32, *Green vs. Skipworth and others*. According to these sound and well established principles, let us proceed to the examination of the case before us: first premising that no bequests having been made by the alleged nuncupative will, it is not subject to the operation of the Statute of Frauds in relation to such testaments; nor to that of the Act of Assembly of 1810, chap. 34.

The only effect of the will, if admitted to probat, and it were competent to effectuate the supposed intent of the testator, would be to secure to the appellant the appointment of executor or administrator of the deceased, and the guardianship of his only child. The latter object, however, could not be accomplished; a written will being made indispensable for such a purpose, by the Statute of 12 Car. 2, chap. 24.

To the admission to probat of the will in question, a number of objections were interposed in the Orphans' Court, most of which we deem it unnecessary to examine. That on which we think the decision of the cause mainly depends, as far as such objections are concerned, is the allegation of the appellees, that the will, attempted to be proved, was not the voluntary act and free will of the deceased, but he was induced to speak of his affairs, as mentioned in said paper, by the suggestion of others, only a short time before his death, and when he was not in a mental or physical condition to make a will, or execute a valid deed or contract; and that in the situation in which he was placed, and the circumstances connected with the execution of said paper, he was too weak to transact business, or to resist the suggestions that were made to him, of the necessity of making a will; and said words, attributed to the deceased, were used by him in consequence of the undue influence of said suggestions. To establish the will, the appellant produced four witnesses, being the only persons, except himself, who appear to have been with the deceased at the time it is alleged to have been made. Two of those were the attending physicians; one a person sent for

by the appellant, and the fourth an accidental visitor. The Orphans' Court proceeded to take their testimony; and as respects the sanity of * the decedent, what have they testified? The first witness Dr. Sedwick, after detailing what he alleged as having occurred **200** on the morning of the making of Coberth's testament, and of his death, proceeds thus: "this deponent further says, that the reason why he mentioned this subject to Hezekiah Coberth was, his having heard him, during his illness, express a wish to make some arrangement respecting his affairs; that they were not at that time, as he wished; and that he wished that they, Dr. L. L. Weems and himself, should do something for him, as he wished to recover and recruit to make some arrangements; and that at the time he Hezekiah Coberth made these declarations, he was perfectly sane; and that the aforementioned words, purporting to be his last will, were spoken by Mr. Hezekiah Coberth in the presence of him the deponent, Dr. L. L. Weems, James M. Sollers and James Williams; and that they were spoken in his last illness, and in his own house and place of residence; and that he this deponent was called to Mr. Hezekiah Coberth, on Saturday previous to his death; and that the words, expressive of a disposition to make some arrangement, were spoken a part on Monday, and a part on Tuesday or Wednesday." The deceased died on Thursday morning, as proved by Dr. Sedwick. He gives no testimony as to the sanity of the mind of the decedent, at the time of the nuncupation in question, but confines his evidence on this subject, to its state some one, two or three days before. Dr. Weems states that, "on Thursday morning he found him (Coberth,) in a dying condition, but perfectly rational." James M. Sollers says, "he believes that Mr. Hezekiah Coberth was rational" at the time of the alleged nuncupation. But what degree of rationality was meant by the witness? Whether a mere exemption from delirium, or such a degree of intellect as would enable its possessor to make a valid deed or contract, or a reasonable or sensible disposition of his property, does not appear. James Williams, the remaining witness, gives no testimony as to the sanity of the deceased. When then we advert to the fact, that the want of mental capacity in the deceased, was a ground of objection to the probat; that, independently of * such objection, it was the duty of the appellant to prove **201** such capacity by the clearest and most indisputable testimony; that of the four witnesses to the will, but two of them testify as to such capacity; that he who does so most strongly, says, that when he visited Coberth, on the morning of the alleged nuncupation, (which was the morning of his death,) he found him in a dying condition; that all the facts given in evidence by the witnesses as to the conduct of the deceased, and those around him, during the time of the alleged nuncupation, leave upon the mind doubts as to the mental capacity of the testator. We think the Orphans' Court were right, upon that ground, in refusing to admit to probat the

proffered nuncupative will. We think, too, looking to all the proof in the cause, and the manner in which, by interrogatories, the alleged nuncupation was drawn from the decedent, that there was not such proof of spontaneity, and of the *animus testandi* as is indispensable to the validity of such a will. The only reported case, which we have met with of a will made by interrogatories to the testator, is that of *Green vs. Skipworth and others*, 1 *Eng. Eccl. Rep.* 32: at which it is only necessary to glance for a moment, to see that its admission to probat stands upon grounds infinitely stronger than could be urged in favor of that now under consideration. To grant probat to the will now before us, would, in our opinion, establish a precedent fraught with the most dangerous tendency.

The decree of the Orphans' Court is affirmed with costs.

202 *JOHN STEYER *vs.* JOHN HOYE, H. M. PETTIT and JAMES SMITH.—December, 1841.

On the 28th December, 1835, S. obtained a warrant of resurvey, which he executed and closed at the county surveyor's office on the 10th June, 1836. On the 1st November following, he caused a new survey to be made, taking in a much larger amount of vacancy than on his first survey. The second survey was returned into the land office on the 17th November, 1836, and caveated on the 5th December, 1836, and 12th August, 1837. J. under a common warrant returned a certificate of survey into the land office on the 13th August, 1836, then paid his composition money, and on the 3rd March, 1837, his certificate not being caveated, procured a patent. The patent of J. extended across the land taken up by S. so as to destroy the contiguity between the original tract of S. and its adjacent vacancy, and the vacancy which S. claimed to include under his second survey. The vacancy thus cut off, was claimed by H. under a certificate returned to the land office on the 2nd September, 1836, compounded on the same day, caveated by S. in November, 1836, and patented upon the overruling of that caveat in November, 1837. Upon a bill filed by S. to vacate the patents to J. and H. upon the ground of combination and fraud, to intercept the due prosecution of his warrant, by the wrongful interposition of J's patent, for the purpose of destroying the continuity of the vacancy. It was *held*, there was no proof of fraud; that if S. had not neglected for six months to enter his caveat to J's patent, the Judge of the land office would have rejected his certificate, and thus the equitable right of priority in S. would have remained unimpaired.

- ▲ warrant of resurvey gives the holder thereof a prior right according to its seniority, to acquire a title to all the vacancy contiguous to his tract of land; but at the same time the law exacts due diligence according to the rules of the land office, from such a holder, to perfect his equitable title in due season, or protect himself from the operation of other surveys which may conflict with his rights, and which he did not (as he might have done,) caveat. (a)

(a) See *Garretson vs. Cole*, 2 H. & McH. 305, note.

No land can be taken up under a warrant of resurvey as vacancy, but that which lies adjacent to the tract resurveyed. It may extend to the lines of other tracts, but not beyond or over them.

Where a tract of vacant and unpatented land may be affected by one of two outstanding warrants, the fact that the one, which has not the prior right, did execute his survey, and proceed to procure a patent in the absence of a caveat before the other, is not a circumstance from which a Court of equity will infer fraud.

It is a general and well established rule of the land office, that no patent shall be issued for any land for which a patent has been previously granted, yet it often happens from inattention or accident, that this rule is not observed, and therefore it has been laid down from a very early period, that a patent always gives title by relation from the date of the certificate, special warrant, or entry in the surveyor's book, on which the land has been particularly designated and described. *Per* BLAND, J. L. O.

* For this purpose a warrant of resurvey is considered as a special warrant, binding from its date, so that by this legal relation to the date of the certificate or special designation, the evils which may arise from there being apparently two legal titles, derived from the same grantor, for the same land, may be in a great measure easily corrected. *Per* BLAND, J. L. O. **203**

Where there are remaining in the land office two certificates, held by different persons, for the same land, upon which no patent has been issued, the holder of the elder certificate may by caveat prevent a patent from issuing on the younger one; but if he does not do so, and a patent is obtained on the junior certificate, a patent will not upon a caveat be granted upon such elder certificate. *Per* BLAND, J. L. O.

All proceedings in the land office being public, and open to all persons, it may fairly be presumed, that the holder of the elder certificate, knew of and waived all objection to the issuing of a patent upon the junior certificate. *Per* BLAND, J. L. O.

A patent obtained upon a junior as against an elder certificate, or special warrant, by reason of the negligence of the holder of such elder certificate or special warrant in not attending to his prior rights, or not filing a caveat, is valid; and may destroy the continuity of an adjacent vacancy, for which otherwise the holder of the elder certificate might have procured a patent. *Ibid.*

A caveat may be entered at any time before, but not after a patent has been actually signed by the Governor and Chancellor, and the great seal affixed thereto. *Ibid.*

APPEAL from the Court of Chancery. On the 31st August, 1838, John Steyer filed his bill alleging, that being seized of a tract of land called "the Plains of Moab," contiguous to which it was supposed there was to be found much vacant land, he did on or about the 28th day of December, 1835, sue out of the land office a warrant to resurvey his aforesaid tract of land called "the Plains of Moab," with liberty to include contiguous vacant lands; that said warrant was shortly afterwards placed in the hands of the surveyor for execution; and on or about the 1st of November, 1836, was executed, and a certificate of the resurvey made on account of complainant, was

returned into the land office; whereby it appears that your orator's original tract contained the quantity of 3,773 $\frac{3}{4}$ acres, clear of elder surveys; and that the surveyor had included the quantity of 3,369 $\frac{1}{4}$ acres of vacant land; and that the whole was reduced into one tract by the name of Competition, as by reference to said certificate now remaining * in the land office, will appear; that he duly com-
204 pounded on his aforesaid certificate of resurvey, and thereby entitled himself to demand a patent therefor, and but for the acts and doings of the defendants hereinafter named, would have obtained such patent in due season. But now, so it is, that John Hoyer, Henry M. Pettit and James Smith, confederating together to defraud complainant of the benefit of his aforesaid warrant of resurvey, and to appropriate the vacancy to themselves, the said John Hoyer caused a common warrant, which he had previously sued out of the said land office, to be laid on or before the 22nd April, 1836, on a part of the vacancy, so as aforesaid affected and bound by the complainant's warrant of resurvey, and returned into the land office a certificate of his survey by the name of "Coal;" and afterwards having assigned a moiety of his interest in said certificate to the said Pettit, the said partners on or about the 2nd May, 1836, sued out a warrant to resurvey said tract, with the power of taking up the contiguous vacancy, which said warrant was executed on the 10th June, 1836, and a certificate of the resurvey thereof was shortly afterwards returned into the said land office by the name of "Coal and Iron Certain;" whereby it appears, that under cover of their aforesaid warrants, the said Hoyer and Pettit had taken up and appropriated the quantity of 2,756 $\frac{1}{2}$ acres, parcel of the vacancy, which was designed to be affected, and in truth was bound by the complainant's warrant of resurvey. The complainants thereupon entered caveats against the issuing of patents on the aforesaid certificates of the said Hoyer and Pettit, and they entered a cross caveat against your complainant's aforesaid certificate for "Competition," and depositions were taken by the parties aforesaid, and returned into the said land office, to be used at the hearing of the aforesaid cross caveats.

The complainant was then for the first time made aware of the fact, that the said confederates, the better to advance their aforesaid wrongful purposes, had procured a common warrant of resurvey to be issued out of the said land office in the name of the said James
205 H. Smith, under color of which the said Smith * had taken up another body of vacant land, which was as aforesaid covered by your orator's warrant of resurvey, and had caused a certificate of survey thereof to be returned to the said land office by the name of "Birmingham Mines," and procured a patent to be issued therefor to him, and having thus secured a legal title to the said land, a caveat was entered in the name of said Smith against the said Steyer's certificate of resurvey.

That at the hearing of the aforesaid caveats, which were heard together, the complainant's counsel insisted, that he had made out a clear, legal, and equitable title, to all the aforesaid vacancy against the aforesaid confederates; but the Chancellor (as Judge of the land office,) was of opinion, that inasmuch as the said Smith had procured a patent for the said tract called "Birmingham Mines," it would be necessary to have that tract vacated before a second patent could be granted to complainant for the same land; and therefore the caveat of the said Smith against Steyer's certificate was ruled good. And the Judge of the land office was further of opinion, that the continuity or connexion between the vacancy included in the aforesaid certificates of the said Hoyer and Pettit, and your orator's original tract called "the Plains of Moab," having been destroyed by the intervening survey of the said Smith of "Birmingham Mines," the complainant could make no title to the said vacancy under his aforesaid warrant of resurvey; and therefore the complainant's "caveats" against the said Hoyer and Pettit were overruled; and the caveat of the said Hoyer and Pettit against complainant's certificate was held good, and a patent was directed to be issued to them for the vacancy, and so as aforesaid included in their surveys, all which will appear, &c.

The bill then alleged that complainant was advised that said judgments were not conclusive against his claim to equitable interposition of this Court, against the technical rights which have been acquired by the aforesaid confederates; and that he will be entitled to a decree vacating all the patents granted to the parties aforesaid, or declaring that said parties shall stand seized of the premises so granted to them as trustees for the *complainant, and requiring them to convey the same unto him upon proving the **206** fraud and confederacy aforesaid; and even in the absence of any proof of actual fraud on the part of the said parties, that Chancery will impute to them an improper and fraudulent motive, from the fact that they were aware of the existence of your orator's warrant of resurvey, and of its legal operation, in giving a priority of right or pre-emption to your orator to all the aforesaid vacancy, at the very time they were seeking by the practices aforesaid, to appropriate the same vacancy to their own use. And complainant suggests that his resurvey was in fact made before the granting of the aforesaid patent to the said Smith; his resurvey was made at a time when it was perfectly competent to him, according to the usages of the land office, to include therein all the vacancy which he has included, and if according to the strict rules of the office, his resurvey once rightly made, could be avoided by the subsequent grant of a portion of the land so taken up by him, to the said Smith, he is advised that the effort to avail themselves of this unjust operation of the rule, was a breach of equity and conscience on the part of the said Hoyer and Pettit, which ought to subject them to the pointed rebuke of this

honorab!e Court. And the complainant charges, that he was entirely ignorant of the existence of the aforesaid survey of the said Smith, until after a patent had been granted to him as aforesaid; and by the practice of the aforesaid parties was led to believe, that the certificates aforesaid of the said Hoyer and Pettit were alone relied on to defeat his rights; and he further avers, that the grant of the patent to the said Smith as aforesaid, operated as a surprise on him, and that all the measures of the aforesaid parties, and every of them, were had with full notice of the existence of your orator's warrant of resurvey, and of its legal operation, and of the intent of your orator to avail himself thereof, and for the purpose of defeating its operation, and securing the aforesaid vacant land to themselves. Prayer for general relief according to his case.

The several answer of John Hoyer alleged, that in April, 1836, he, this defendant, made a survey of a tract of land *called
207 "Coal," situated, &c.; that his survey was duly and legally made, and that he assigned the one undivided half or moiety of the same to Henry M. Pettit, the aforesaid, who paid him a valuable consideration for the same; and that the office certificate of the same was some time in the month of April, 1836, returned into the land office, and the composition money due to the State for the vacant land so taken up was regularly and duly paid into the treasury; that a warrant of resurvey was sued out of the land office by this defendant, and the said Pettit, to resurvey said tract of land, and vacancy, &c., and that in the month of May, 1836, this defendant and the said Pettit instructed the surveyor of Allegany County to execute the same; that after the said surveyor had made some progress in the execution thereof, he, the said surveyor, informed this defendant and the said Pettit, that the said John Steyer was at that time the holder of a warrant of resurvey; that either might or did extend to and affect the vacant land intended to be taken up by this defendant and the said Pettit, under their aforesaid warrant of resurvey; that this defendant for himself and in behalf of the said Pettit, then instructed the said surveyor to do nothing more towards the execution of their said warrant of resurvey until the said Steyer should have executed his aforesaid warrant, and should have taken what vacant land he might desire to take up under the same; that the said surveyor did so suspend the execution of the aforesaid warrant of this defendant's and the said Pettit's; that on or about the 10th day of June, 1836, the said Steyer did execute his said warrant of resurvey, as appears by the record of the certificate of said resurvey, called "the Plains of Moab," resurveyed on the books and records of the surveyor of Allegany County, to a copy of which certificate marked A, herewith exhibited, this defendant asks leave to refer as a part of this answer. This defendant further answering saith, that when he instructed the said surveyor to suspend the execution of his and the said Pettit's warrant of re-

survey as aforesaid, he at the same time requested the said surveyor to proceed as soon as he could after said Steyer should have executed his aforesaid warrant, and to * take up for this defendant and the said Pettit, all the vacant land left unoccupied and not **208** taken up by the said Steyer; that in making this request he wished to practise no unfairness towards the said Steyer, but this defendant did so in the prosecution of his own rights; that the said Steyer's warrant had lain unexecuted from 28th December, 1835, until the summer of 1836, during all which time the said Steyer had full opportunity and leisure to make his mind about the location and quantity of the land he might wish to take up; that this defendant expressly told the said surveyor to defer the execution of the warrant belonging to this defendant and the said Pettit, until the said Steyer should take whatever quantity of vacant land he might choose to take, and then to take up for this defendant and the said Pettit, the remaining vacancy, whatever the quantity might be.

That this defendant is advised, that the records as aforesaid of the certificate of the resurvey of the said John Steyer, made on the 10th June, 1836, as aforesaid, was full notice to the whole world of the execution of his warrant dated on the 28th day of December, 1835, and of the quantity and location of the land he had elected to take under that warrant. That in pursuance of the instructions given to him by this defendant, the said surveyor, shortly after the said Steyer had executed his warrant, proceeded to complete the execution of the warrant of resurvey of this defendant's and the said Pettit's; that in conformity with the practice of said surveyor, the said resurvey is dated on the day of its commencement, which was the 17th May, 1836; that the said resurvey or tract of land was called "Coal and Iron Certain;" that it contains the quantity of 2,756½ acres of land, and that the composition money on the vacant lot therein included, was duly paid into the Treasury of the State by this defendant and the said Pettit, a short time after the said resurvey was completed, the office certificate of said resurvey having been duly returned into the land office by them. And this defendant further answereth and saith, that no other person whatever except the said Pettit, ever had or now has any share, part or interest, with **209** this * defendant in the said tract of land called "Coal and Iron Certain," and that the said Smith never had any interest direct or indirect in the same, and that this defendant never told him any thing about the taking up of said land, when this defendant was about to take up the same in connection with the said Pettit: and further, that this defendant never had, nor has he now, any part, share or interest in the tract of land called "The Birmingham Mines," taken up by the said Smith in the summer of the year 1836; that when the tract of land called "Coal and Iron Certain" was taken up for this defendant and the said Pettit, this defendant instructed the surveyor of Allegany County, to include in said tract all the land

left vacant by the said Steyer, at the time of his executing his aforesaid warrant, and that this defendant thought the said surveyor had so included all said vacant land in said tract of land called "Coal and Iron Certain," and that this defendant did not then know that the intervening vacancy between the land taken by said Steyer, on the 10th day of June, 1836, and the tract called "Coal and Iron Certain," did exist at all, and that this defendant and the said Pettit, and that neither of them, left said piece of land so intervening remaining vacant for the purpose of permitting or enabling the said Smith to take up the same, and that the said piece of land was not left vacant by this defendant, or by this defendant and the said Pettit, in order that the said Smith might take up and intercept or cut off the connection between the tract of land called "The Plains of Moab Resurveyed," and the said tract called "Coal and Iron Certain," or in any manner to injure the said Steyer, or prejudice him in the enjoyment of any of his rights under any warrant of his, or in any manner to benefit, favor or befriend the said Smith, or any other person in relation to said intervening and remaining piece of vacant land. And further, that this defendant and the said Pettit had nothing to do with the suing out of a warrant out of the land office in the name of the said James Smith or James H. Smith, or any other person, for the purpose of taking up said piece of vacant land, nor had this defendant, or this defendant and the said Pettit, any thing to do with the * warrant purchased by said Smith for that purpose. And

210 this defendant further answereth and saith, that the tract of land called "Coal and Iron Certain" was not taken up, or the certificate of resurvey thereof, dated on the 10th day of June, 1836, but on the 17th day of May, 1836, and that the certificate of the resurvey made by the said Steyer under his aforesaid warrant, bears date properly on the 10th day of June, 1836, and not on the 1st day of November, 1836, and that the original tract of land on which said Steyer's warrant was sued out did not contain the quantity of 3,773 $\frac{3}{4}$ acres but the quantity of 456 $\frac{3}{4}$ acres, and that the resurvey made under his said warrant did not contain the quantity of 3,369 $\frac{1}{4}$ acres of vacant land, but only the quantity of 121 $\frac{1}{4}$ acres of vacancy, as appears by the certificate of resurvey bearing date on the 10th day of June, 1836, and placed on the records of the surveyor of Allegany County as aforesaid, a copy of which certificate is herewith exhibited and referred to, marked A. And further, that the alleged resurvey called "Competition," was not fairly made, nor at a time when it was competent and proper for the said John Steyer to make the same, inasmuch as that resurvey was professedly made on the 1st day of November, 1836, when in truth the warrant of resurvey under which it was professedly made, had been already executed on the 10th day of June, 1836, as aforesaid; that by the certificate of said resurvey placed on record in the surveyor's office as aforesaid, the said Steyer gave notice to this defendant and the

whole world, of the execution of his, the said Steyer's warrant, on the 10th day of June, 1836, and of the quantity and boundaries of the land he had chosen to take up under his said warrant, and that it was perfectly competent and right for this defendant and the said Pettit, to take up the vacant land left by the said Steyer at the aforesaid execution of his warrants, at the time when they did take it up, as this defendant is advised; that it was not competent and right for the said Steyer to reform his said warrant and execute it a second time, even for his own use and benefit, to the prejudice of the rights of this defendant and the said Pettit, in the premises, much less could the warrant of the said * Steyer be executed a second time for the benefit of a third 211 party, as this defendant is advised. And this defendant further answering and saith, that he is credibly informed and verily believes, that the said warrant of the said Steyer was executed on the said 1st day of November, 1836, not for the use and benefit of the said John Steyer himself, but for the use of a certain Joseph Dilly and a certain George McCulloh, who, wishing to deprive this defendant and the said Pettit of the land included in said tract called "Coal and Iron Certain," purchased from the said John Steyer, the privilege of executing his aforesaid warrant a second time, after it had been already executed on the 10th day of June, 1836; that this defendant is informed and verily believes, the honesty and propriety of the said second execution of said Steyer's warrant was a matter of doubt even with some of the parties interested in the scheme; that the said Dilly and McCulloh, well knowing that they could not at the time spoken of, nor at any time afterwards, acquire title to the land already taken up by this defendant and the said Pettit, and included in said tract called "Coal and Iron Certain," under any new warrant to be by them sued out of the land office, after taking legal advice as to the propriety of the measure entered in the name of the said Dilly, with much caution, into a contract with the said John Steyer in writing, according to which contract the said Dilly was authorized to use the name of the said John Steyer, in the execution of his said warrant of resurvey, which had been already executed on the 10th day of June, 1836, and as soon as a patent should issue to said Steyer, for the land to be taken up under the second execution of said warrant, then the said Steyer was bound to convey to the said Dilly, the land so patented to the said Steyer; that the consideration according to said contract to be paid, and it is believed was paid to the said Steyer by the said Dilly, was a small sum of money; that certain blanks to be filled according to said written contract, with a reference to a certain plat said to be in the hands of the county surveyor, were left in the written contract itself, but it has never been made to appear that there was at that time any * plat belonging to the parties in the hands 212 of the said surveyor, except the usual plat belonging to the

certificate of resurvey, dated on the 10th day of June, 1836, as aforesaid; that however the said instrument of writing executed as a contract between said Steyer and Dilly, might have been intended by Dilly to affect the mind of Steyer in relation to vacant land then still to be taken up, it was not considered safe to rely on said contract at the hearing of the cases of *caveat* between the said Steyer and this defendant and the said Petit; and to give a better coloring to the proceedings of the said Dilly and McCulloh, a second contract in writing was executed between Steyer and Dilly, it is believed by this defendant sometime in the month of April, 1837, according to which latter contract, the additional vacancy taken up by Dilly at the second execution of said Steyer's warrant, was specifically parcelled out between the said Steyer and the said Dilly, to which said written contracts this defendant would refer for greater certainty, as remaining in the papers in the *caveat* cases above mentioned, adjudged by his honor the Chancellor, in the month of November, 1837. And this defendant further answering, that he is advised the laws of Maryland, and the usages of the land office, will not recognize or sanction such a use of a warrant of resurvey as that attempted by the said Dilly, or Dilly and McCulloh, hereinbefore stated; that the said laws and usages require the holder of the warrant to be seized of an estate in fee simple, in the tract of land on which the warrant of resurvey is sued out; that a warrant of resurvey possesses no assignable qualities; that the said Dilly was not, nor were the said Dilly and McCulloh, seized of any kind of an estate in the tract of land on which the said John Steyer had sued out his said warrant of resurvey; that the said Dilly or Dilly and McCulloh, could not do indirectly what they could not do directly, in the premises; that if the said Dilly had wished to act fairly and uprightly in the business, he would have applied to the land office for a warrant to take up said vacant land in the usual manner, and that he would not have veiled his designs behind said Steyer's warrant, by attempting * to execute it a second time. This defendant further

213 answereth and saith, that he is credibly informed and verily believes, that a part of the design of the said Dilly and McCulloh in their aforesaid scheme was, that they might under color of said Steyer's warrant, be enabled with a better grace to use the field notes and plats used by this defendant and the said Pettit, when this defendant and the said Pettit took up said tract of land called "Coal and Iron Certain;" and that it appears from the testimony of the surveyor of the county in the aforesaid *caveat* cases, that the said Dilly instructed the said surveyor to use the said field notes and plats at the second execution of said Steyer's warrant, and when the said tract called "Competition" was ostensibly taken up, and that in fact all the surveyor was required to do under the instructions of said Dilly in this case was, to extend the said Steyer's first resurvey made on the 10th day of June, 1836, by platting on the tract of land

then taken up by this defendant and the said Pettit, and called Coal and Iron Certain. And this defendant further answereth and saith, that he is advised the attempt of the said Dilly and McCulloh to use the warrant of the said Steyer, by executing it a second time for their own benefit, and their further attempt to avail themselves of the labor, expense and information of this defendant and the said Pettit, in taking up said tract of land called Coal and Iron Certain, and applying said labor, expense and information to their own account, in making said survey called Competition, was a fraud committed by them against this defendant and the said Pettit, and that this allegation of fraud is fully justified and sustained by reference to the said surveyor's testimony in the *caveat* cases aforesaid, whereby it appears that the said surveyor could not have executed said Steyer's warrant a second time in the manner he did, without using the field work and plats aforesaid, belonging to this defendant and the said Pettit. This defendant further answereth and saith, that he is advised the use made of the said John Steyer's name throughout the whole of the present controversy, is altogether unlawful and unjustifiable; that in fact, looking no further than the first * contract made in writing between Dilly and John Steyer, the said Steyer is throughout the controversy in every stage of it, nothing more than a nominal complainant; that from the testimony taken in the *caveat* cases aforesaid, it fully appears that the said Dilly, in company with a lawyer, went to said Steyer and got him to enter into the aforesaid contract, and that by that contract the said Dilly binds himself to pay all the costs that may arise in the controversy then cautiously commenced by Dilly, or Dilly and McCulloh, about the lands sought to be taken from this defendant and said Pettit, by the aforesaid device of using said Steyer's warrant; that from the said testimony it further appears, that even in the commencement of the dispute the said Steyer was passive, and in the commencement and throughout the controversy, this defendant is informed and verily believes, that the said Dilly and McCulloh were the agitators of strife and the projectors of law-suits for their own benefit, and to answer their own sinister puposes; to all of which testimony taken in said cases of *caveat*, this defendant begs leave to refer as a part of this his answer, to said bill of complaint. **214**

This defendant further answereth and saith, that he had no notice of any warrant of the said Steyer's at the time when this defendant and said Pettit made said resurvey called "Coal and Iron Certain," except the notice which this defendant had of the warrant of said Steyer, executed on the 10th June, 1836, as aforesaid; and that from the records of the surveyor's office of Allegany County, it appears that said warrant was executed on the 10th day of June, 1836, as aforesaid, which record was notice to the world of the execution of said warrant, and of the quantity and location of the land taken up under it by the said complainant.

This defendant further answereth and saith, that the aforesaid resurvey called "Coal and Iron Certain," was fairly and properly made by this defendant and the said Pettit; and that this defendant never did in any manner practise, or attempt to practise, any surprise on the said complainant or those using his name, preparatory to or at the hearing of the aforesaid *cases of *caveat*.

215 And this defendant further answereth and saith, that he is advised there is no just cause why the decree passed by his honor the Chancellor at the hearing of the aforesaid cases of *caveat* ought to be reversed, or the patent granted to this defendant and the said Pettit, for the said tract of land called "Coal and Iron Certain," vacated. This defendant denies all and all manner of unlawful combination, confederacy and fraud, wherewith he is by the said complainant's said bill of complaint charged, and humbly prays to be hence dismissed, &c.

With this answer was filed exhibit A :

State of Maryland, *Set* : By virtue of a special warrant of resurvey, granted out of the Land Office for the Western Shore, to John Steyer of Allegany County, bearing date the 28th day of December, 1835, to resurvey the following lands lying and being in Allegany County aforesaid, viz: The Plains of Moab, originally on the — day of — granted — for — acres — and — part of Sideland Hill, originally on the — day of — granted — for — acres. To amend any errors in the original surveys, add any vacant land thereto contiguous, and to reduce the whole into one entire tract, &c. I certify as Surveyor of Allegany County, that I have carefully resurveyed, for and in the name of him the said John Steyer, the tract of land called the Plains of Moab, and find it to contain $456\frac{3}{4}$ acres, to which I have added two pieces of contiguous vacancy, containing $121\frac{1}{4}$ acres, and have reduced the whole into one entire tract. And lastly, beginning for the outlines of the whole at the beginning of the Plains of Moab, the present original, it being also the beginning of Sideland Hill, a former original, and running thence with the lines of the Plains of Moab, the present original, &c.

To the end of the 24th and last line of the original, then by a straight line to the beginning, containing $577\frac{5}{8}$ acres. To be held by the Plains of Moab Resurveyed. Resurveyed the 10th day of June, 1836.

BENJAMIN BROWN,

Surveyor of Allegany County.

216 * The original contains $456\frac{3}{4}$ acres.

The first vacancy contains $62\frac{1}{4}$.

The second vacancy contains 59.

The two vacaneies contain $121\frac{1}{4}$.

The resurvey contains $577\frac{5}{8}$.

Annexed to the certificate was the surveyor's plat.

The several answer of H. M. Pettit was similar to that of J. Hoyer.

The several answer of James Smith saith, that in the month of May, 1836, this defendant was one day present when some reference lines were run under the direction of the said John Hoyer, along the base and south-eastern slope of Savage Mountain; that this defendant was so present, not because he had any interest in the surveying done on said day, but because on the day following, some lines were to be run, and were run, in which this defendant was interested, which said lines so run on said second day, were run in the neighborhood of a tract of land called Commonwealth; that this defendant did not at that time know the object of said Hoyer in running said lines on said first day, further than that he supposed the said Hoyer was doing so with a view of taking up vacant land; but no questions were asked and no explanations given on the subject; that this defendant had not then, nor has he now, nor has he at any time since, had any interest, share or part, direct or indirect, in the aforesaid surveying or running of lines, done on the said first day under the direction of the said Hoyer; that he has since learned that said lines run on said first day by said Hoyer, had relation to the tract of land called Coal and Iron Certain, taken up by said Hoyer and Pettit, and that this defendant has not now, and never has had, any share, part, right or interest in said tract of land with the said Hoyer and Pettit, or any other person. This defendant further answereth and saith, that in the summer of the year 1836, he understood from various sources that a controversy had arisen between the said Hoyer and Pettit on the one side, and the said complainant or a certain Joseph Dilly, on the other side, respecting some land which the said Hoyer and Pettit had taken up, as * this defendant understood; that the said complainant had executed a warrant, as this defendant was told, and had **217** taken up some vacancy under his said warrant, and that the said Hoyer and Pettit had taken up some vacancy contiguous to the said vacant land so as aforesaid taken up by the said complainant under his warrant, and that the said Dilly wished to have the said complainant's said warrant executed a second time, so as to include, as this defendant understood, the land already taken up by said Hoyer and Pettit, and that the said Dilly, claiming under the said complainant's warrant so executed a second time, wished to secure to himself the title to the said land already taken up as aforesaid by the said Hoyer and Pettit; that such was the opinion this defendant had formed about said controversy, that this defendant here distinctly adds, that the impression made on his mind at that time, concerning the pretensions of the said complainant or Dilly on the one side, and the said Hoyer and Pettit on the other side was, the piece of vacancy taken up in the first instance by the said Steyer, and that taken up by the said Hoyer and Pettit, either met at a point or were united by a broader tie; that this defendant understood the said parties to be at issue, as to the right of the said Steyer to execute his aforesaid warrant a second time for the use of the said Dilly, or rather, as to

the right of the said Dilly to execute said warrant a second time in the name of the said Steyer, but in fact for the benefit of the said Dilly himself, to the prejudice of the rights of the said Hoyer and Pettit in the premises; that the field of controversy, as this defendant understood, was limited by the lines of said Hoyer and Pettit's survey, which this defendant has since learned was or is called Coal and Iron Certain; that in making their said surveys, each of the parties had made a selection of the quantity and location of the land by them respectively desired to be taken up; that for several years last past, this defendant has been in the practice of purchasing from the State, any vacant lands he could discover that were in his opinion worth the labor and expense of being surveyed and compounded on; that in the summer of the year 1836, this defendant

218 took *up the opinion that there possibly was vacant land lying in the neighborhood of the disputed lands above mentioned, but this defendant had a very imperfect knowledge of that district of country, having never passed through it except in the month of May, 1836, when he was one day occasionally with the surveying party already mentioned, as running reference lines under the direction of the said Hoyer; that this defendant's mind became impressed with the belief that there was some vacant land between a tract called Stony Ridge and the Bat, on the one side of a tract called Addition to Policy, and some Soldiers' Lots on the other side; that this defendant had a conversation with surveyor of Allegany County concerning said supposed vacancy, and requested him to make some examinations on the subject; that the said surveyor informed this defendant that there was vacant land at the place above designated, that the part of said vacancy towards the north was broad, and that there was another broad piece of vacancy considerably further to the south, and that it was doubtful whether there was any connecting piece of vacancy extending from said broad piece in the north to said broad piece in the south, but on further examination the said surveyor told this defendant that there was such a connection; that this defendant purchased from a certain Moses McNamee a common warrant, and laid the same upon the said piece of vacant land, sometime in the month of August, 1836, and directed the county surveyor to execute the same; that the said surveyor did execute said warrant, and this defendant on or about the 2nd September, 1836, returned the certificate of said survey into the land office, and fully compounded on the same on the said 2nd September, with his own money, and that said tract of land so taken up he called The Birmingham Mines, and not Birmingham Mines as the said complainant had named in his said bill of complaint; that the said Hoyer and Pettit had not, nor had either of them or any other person, any concern with this defendant in purchasing said warrant, and that no warrant of any kind was sued out of the land office by this defendant or any other person, for the purposes of enabling this defendant to make said

*survey, and that there never was, so far as this defendant knows, any warrant of resurvey sued out in the name of James H. Smith, for that or any other purpose; that when this defendant directed the said surveyor to execute the aforesaid common warrant, he told said surveyor to include all the vacant land where it was located, whatever the quantity might be; that this defendant did not at that time, possess any specific knowledge of the location of the said complainant's survey, which he then understood had been recently executed, nor did he know anything about the survey of said Hoyer and Pettit, further than that he knew the region in which it lay; that this defendant did not then know the location of a single line of said Steyer's land, and had not to his knowledge ever seen said Steyer's plantation or residence; that the surveyor told this defendant, the land by him taken up in his tract called the Birmingham Mines, was vacant, and this defendant then took up, not knowing that in doing so he was to become a party in the controversy between the said complainant and the said Hoyer and Pettit, or that any one laid claim to the land taken up by this defendant. This defendant further answereth and saith, that he made the said survey called the Birmingham Mines fairly, and without any fraud towards the said complainant or any other person, and that the said John Hoyer and Henry M. Pettit have not now, nor has either of them now, nor have they or either of them at any time had any share, part, claim or interest with this defendant, in his aforesaid tract of land called the Birmingham Mines; that this defendant is advised, there is no law of the State of Maryland, and no usage or regulation of the land office of said State, requiring this defendant to give notice to any person that he intended to take up or had taken up said tract of land, further than the notice spread on the record of the surveyor of Allegany County, ascertained in the certificate of survey of said tract of land taken up by him, which said certificate of survey of said tract of land was duly recorded on the public books of said surveyor, and the office certificate thereof was duly filed in the land office and compounded on at Annapolis, at both of which places the said *complainant, or those claiming under him, or using his name, had counsel, and that the said complainant himself resides in Allegany County, and that the said complainant and the world were bound to take notice of the acts of this defendant in relation to said survey called the Birmingham Mines, as they appeared, set forth and published on said records. This defendant further answereth and saith, that he practised or endeavored to practise no surprise towards the said complainant in taking up and procuring a title for said tract of land; that as appears by the aforesaid records of the surveyor of Allegany County, the said complainant had executed his aforementioned warrant on the 10th day of June, 1836, and by virtue of the same had taken up a quantity of vacant land, and that the said Hoyer and Pettit had executed their warrant on or

about the 17th day of May, in the same year, by virtue of which they had also taken up a quantity of vacant land, and that the record of their respective certificates of survey, which said certificates of survey or resurvey, were duly recorded on the surveyor's books of Allegany County, was notice to the world of the quantity and location of the land by them respectively selected and taken up; that the piece of land taken up by this defendant was left vacant and unoccupied by the said complainant and the said Hoyer and Pettit at the execution of their aforesaid warrants; that the same was considered by the surveyor of Allegany County as vacant land; that this defendant took up and compounded on the same because it was vacant land; that in taking up said tract of land and procuring a title for the same from the State, it was no part of this defendant's design in any way to benefit, favor or befriend the said Hoyer and Pettit in their controversy with the said complainant, or those using his name, and that this defendant did not take up said tract of land called the Birmingham Mines, for the purpose of cutting off the connection of any warrant of the said John Steyer's with the land taken up by said Hoyer and Pettit, and called Coal and Iron Certain; not only so, but so unacquainted was this defendant at that time with the locations of the various tracts and surveys in the

221 * neighborhood now spoken of, that this defendant did not then know, nor does he believe he ever did know, till the plats were made out in the *caveat* cases between the said complainant and this defendant, and between the said complainant and the said Hoyer and Pettit; that the said tract of land called The Birmingham Mines, did at all intervene between the pretensions of the said complainant on the one side, and the said Hoyer and Pettit's pretensions on the other side, or cut off the egress of the said complainant with his said warrant, from any locations or survey of his unto the said survey of the said Hoyer and Pettit, called Coal and Iron Certain, which said plats in said *caveat* cases were made out in the summer or fall of the year 1837. That the survey or resurvey called Competition, the certificate of which is made out in the name of the said complainant, bears date on the 1st November, 1836, but that the warrant under which that resurvey was made, had already been executed on the 10th June, in the same year; that in the interview this defendant took up and compounded on said tract of land called The Birmingham Mines, and that the State of Maryland granted the same to this defendant by patent, on the 3rd March, 1837, and that as appears by the endorsement on the said certificate of resurvey, called Competition, the said complainant or Dilly did not pay into the treasury of the State, the composition money on said land until some time in the month of April, 1837, and more than one month after the said tract called The Birmingham Mines, had been patented to this defendant; and that this defendant is advised, the said complainant had thus neither legal nor equitable title to the land contained in said tract

called The Birmingham Mines, when the same was patented to this defendant by the State; that the said tract of land was so patented to this defendant by the State without any objection being made by the said complainant, or any other person whatever, in the form of a caveat against this defendant, or otherwise; and that some time in the summer of the year 1837, this defendant was informed that the said tract of land called The Birmingham Mines, had been by the direction of the said * Dilly merely platted into and included in the plat and certificate of said tract called Competition; **222** and that this defendant then entered a caveat against the issuing of a patent to the said John Steyer for the said tract of land called Competition; that at the hearing of the said caveat, the same was by his Honor the Chancellor ruled good against the said complainant. This defendant further answereth and saith, that he is advised that the said survey called Competition was not fairly made, nor at a time when it was competent and proper for the said complainant to make the same; that in fact the warrant of resurvey under which the said survey or resurvey called Competition, was professedly made, had been already executed on the 10th of June, 1836, and that the said resurvey so made on the 10th day of June, contained according to the certificate thereof, recorded on the surveyor's books of Allegany County, the quantity of 577½ acres of land in the whole, and not the quantity of 3,777½ acres; and that the said resurvey so made on the 10th June, 1836, was called The Plains of Moab Resurveyed; that the said complainant had no right whatever to execute said warrant of resurvey a second time on the 1st day of November, and that the said second execution of said warrant ought to be considered void; not only so, but this defendant is further informed and verily believes, that the said warrant was so executed on the 1st day of November, 1836, in the name of the said John Steyer, not for the benefit of the said John Steyer, but for the use and benefit of a certain Joseph Dilly, who is hereinbefore mentioned, and that a certain George McCulloh had also some interest in the second execution of said warrant; that a short time after the said complainant had executed his said warrant on the 10th day of June, 1836, the said Dilly went to the said Steyer and entered into a contract in writing with him, by which for a small sum of money paid to the said Steyer the said Dilly purchased the privilege of executing said Steyer's warrant a second time in the name of the said Steyer, but in fact for the use of Dilly and his secret partner or partners in the adventure; that the said contract or instrument of writing contained certain mysterious blanks, which according * to said instrument, were to be filled with reference to a plat at that time said to be in the **223** hands of the county surveyor; that it never has been made to appear that there was at that time any plat in the hands of the said surveyor, relative to the said lands mentioned in said instrument of writing, except the certificate of the resurvey called The Plains of

Moab Resurveyed, bearing date on the 10th June, 1836, with the usual plat thereto annexed; that this defendant is advised and verily believes, that when said written contract is stripped of its mystery, it simply amounts to this, that the said Steyer should continue to own the vacancy he had already taken up under his said warrant on the 10th of June as aforesaid; and that the said Dilly was authorized to use said Steyer's name in executing said warrant a second time; and that after patent should have issued to said Steyer for the additional vacancy to be taken up by Dilly at the second execution of said Steyer's warrant, then said Steyer was according to said contract to convey said additional vacancy so taken up to Dilly; that doubting the safety of their position under the aforesaid contract, the said Steyer was prevailed on to execute a second contract in writing, which it is believed bears date in April, 1837, by which the additional vacancy taken up by said Dilly as aforesaid, on the 1st day of November, is professedly apportioned between the said Steyer and the said Dilly, to which said contracts or instruments of writing this defendant refers as being filed among the exhibits in the case of cross caveats between said complainant and the said Hoyer and Pettit, and which the said complainant has made a part of his bill of complaint, that such was the device resorted to by the said Dilly and the said McCulloh, for the purpose of depriving the said Hoyer and Pettit of the benefit of a warrant of resurvey held by them affecting the vacant land intended to be taken up by said Dilly and McCulloh at the second execution of said Steyer's warrant, and for the purpose at the same time of appropriating to themselves the said vacant land under color of the second execution of said warrant, at a time when the said Dilly and McCulloh well knew of said Hoyer and Pettit's warrant, and when the said Dilly * and McCulloh knew that

224 they could not acquire title to the vacant land in question under any new warrant to be by themselves sued out of the land office. This defendant further answereth and saith, that of his own knowledge he knows that the said McCulloh is very officious in endeavoring to procure testimony at the hearing of the cross caveats already mentioned, that on that occasion this defendant acted as the counsel of said Hoyer and Pettit in taking said depositions; that he then saw in the hand-writing of said McCulloh, a paper purporting to be a summary of what the two sons of the said John Steyer would swear in the case; that the said McCulloh on one or two occasions made his appearance at Cumberland with the said young Steyers, apparently under his charge, when said testimony was about to be taken; that the said John Steyer was not present at the taking of said testimony, but the said McCulloh was present while the said young Steyers were under examination; that before one of them was put on his examination, the said McCulloh had a conference in private with him on the outside of the house; that the said McCulloh evinced some anxiety while the said young Steyers were under cross-exami-

nation, that although the said young Steyers evidently gave in a labored and premeditated statement of their knowledge in the premises, they fell considerably short of the contents of the aforementioned summary. That after the decision of the aforementioned cases of caveat by his Honor the Chancellor, an effort was made in the House of Delegates, during the last session of the Legislature, to obtain a reversal of the decree of his Honor the Chancellor, in the aforementioned cases of caveat, or to obtain a result equivalent to a reversal of said decree; that this defendant then appeared at Annapolis, before the committee of the House, to whom the said application was referred; that the said McCulloh appeared in the committee room at the argument of the case, and as this defendant was informed, and verily believes, used his best endeavors with sundry members of the said House of Delegates, to obtain a decision of the matter favorable to the nominal applicant, John Steyer; but that said committee, or all * of them in attendance, unanimously sustained the decree of his Honor the Chancellor, granting a **225** patent to the said Hoyer and Pettit, for said tract of land called Coal and Iron Certain, and ruling the caveat of this defendant good against the said complainant. And this defendant further answereth and saith, that he is advised that the effort of the said Dilly, or of the said Dilly and McCulloh, hereinbefore stated, to avail themselves of the benefit of said Steyer's warrant, by a re-execution of the same; so as to deprive the said Hoyer and Pettit of the use of their aforesaid warrant, and to appropriate to their own use the land included in the said tract called Coal and Iron Certain, as well as the land included in said tract called The Birmingham Mines, was virtually an attempt to subvert and violate the well established rules of the land office, and the Acts of Assembly in such case made and provided, and a device so replete with fraud, as to entitle it to no favor in this Honorable Court. This defendant further answereth and saith, that he is advised, that the intermeddling acts of the said Dilly and McCulloh, in commencing, and from time to time renewing the present controversy in the name of the said John Steyer, but in fact to answer their own purposes, are an offence against the law itself, and will meet with nothing but the merited disapprobation of this Honorable Court. This defendant further answereth and saith, that the only notice he had of said complainant's said warrant, was the conversations that at various times and between various persons, took place in the presence of this defendant, or with this defendant, about the controversy between said Steyer and the said Hoyer and Pettit, except so far as the record of the certificate of said complainant's resurvey called The Plains of Moab Resurveyed, bearing date on the 10th June, 1836, and recorded on the surveyor's books of Allegany County, was notice that the said Steyer had executed such a warrant, to a copy of which certificate marked A, this defendant refers, as filed in the papers in said cases of cross caveats, and exhi-

bited in the complainant's said bill. This defendant further answereth and saith, that he is advised the said complainant was both legally and equitably bound to object to this * defendant's survey called The Birmingham Mines, and the issuing of a patent from the State to this defendant for the same, by caveat entered against said survey in the land office, at some time between the making of said survey and the granting of a patent to this defendant for the same, or to remain silent forever afterwards; that the assignment of the use of a warrant of resurvey in the manner attempted to be practised by the said John Steyer and the said Dilly and McCulloh in the present case, is totally unprecedented and inadmissible, under the laws and usages of the Land Office of Maryland; that if any person has reason to complain of surprise and unfairness in this case it is this defendant, who does say, that the attempt of the said Dilly and McCulloh, to use the said Steyer's said warrant of resurvey, by executing it a second time in his name for their own benefit, for the purpose of appropriating to their own use the land already taken up by said Hoyer and Pettit, when it could not be reached by a new warrant, and the directions given by the said Dilly to the surveyor of the county, as appears by said surveyor's testimony in the caveat case aforementioned, to use the field work and notes of the said Hoyer and Pettit's resurvey called Coal and Iron Certain; and the further attempt to appropriate to themselves at the same time and by the same means, the tract of land belonging to this defendant called The Birmingham Mines, which latter tract they seem to have included merely, by-the-by, is all so full of injustice and so pregnant with fraud, as to deserve but little tolerance in a Court of equity. This defendant further answereth and saith, that he never did in any manner practise any deceit or use any unfair means to secure to the said Hoyer and Pettit a title for their tract of land called Coal and Iron Certain, nor has he this defendant at any time or in any manner practised any unfair means to procure from the State, a title for his said tract of land called The Birmingham Mines; and that if the said complainant or those using his name has experienced any surprise, or met with unforeseen difficulties in the prosecution of the claim set up in the name of the said plaintiff about said tracts of land, such surprised difficulties ought not to be imputed to this defendant as
227 * any fault of his, and that the patent heretofore granted to this defendant by the State of Maryland, for said tract of land called The Birmingham Mines, ought not to be vacated as prayed in the complainant's said bill of complaint. And this defendant denies all, and all manner of unlawful combination, confederacy and fraud, where-with he is by the complainant's said bill of complaint charged, and humbly prays to be hence dismissed, &c.

A commission was issued on the 28th January, 1839, and a variety of proof taken, the results of which, so far as material, to the report of this cause, are stated in the opinion of the Judge of this Court.

By agreement of counsel the following proceedings in the land office were made a part of the record of this cause:

James Smith vs. John Steyer. In the Land Office, 21st November, 1837. It appears from the proceedings, that John Steyer, on the 28th December, 1835, obtained a warrant of resurvey of the tract of land called The Plains of Moab, which he caused to be executed as appears by the certificate returned and compounded on for the tract of land called Competition, on the 1st November, 1836; that James Smith, on the 13th August, 1836, got a certificate of survey for a tract of land called Birmingham Mines, upon which he obtained a patent on the 3d of March, 1837. From the plots returned under the order of survey, it further appears that the tract of land called Birmingham Mines, extends entirely across the vacancy over which John Steyer's warrant of resurvey has been so extended, from the lines of The Plains of Moab, as to reach the greater part of that vacancy of which the tract called Competition is mainly composed, to the westward and northward, beyond the lands patented to James Smith: whereupon, Smith, as the holder of the patent for the tract called Birmingham Mines, on the 12th of August, 1837, entered a caveat against the issuing of a patent upon Steyer's certificate for the tract called Competition. It is a general and well established rule of this office, that no patent shall be issued for any land for which a patent has been previously granted, yet it often happens, from inattention or accident that this rule is not observed, and therefore, it has been laid down from a very early period 228 that a patent always gives title by relation from the date of the certificate, special warrant, or entry in the surveyor's book, in which the land has been particularly designated and described, and for this purpose a warrant of resurvey is considered as a special warrant, binding from its date, so that by this legal relation to the date of the certificate or special designation, the evils which may arise from there being apparently two legal titles derived from the same grantor, for the same land, may be in a great measure easily corrected; where, however, there are yet remaining in the land office two certificates held by different persons for the same land, upon which no patent has been issued, the holder of the elder certificate may by a caveat prevent a patent from issuing upon the younger one. But if he does not do so, and a patent is obtained upon the junior certificate, a patent will not upon a caveat be granted upon such elder certificate, because all the proceedings in the land office being public and open to all persons, it may be fairly presumed that the holder of the elder certificate knew of, and waived all objection to the issuing of a patent upon the junior certificate, because it is the interest of the State to have its vacant land sold, and the titles thereto, without delay, put into complete legal form in the manner prescribed, and also to prevent strife, by refusing to grant several patents to different persons for the same land; and because, he who stands by

unmindful of his duty to the public, (for it is held to be the duty of every citizen to keep the State properly informed as to dealings for public property,) and also so grossly neglectful of his own interests, in preventing a rival claim to his property from being let loose against it, ought not to be indulged with the means of disturbing a title which he had thus silently suffered the State to perfect, or be in any way gratified, until he has by a regular course of judicial proceedings, if he can, caused the patent which he alleges has so unjustly shut out his right to be vacated and annulled. This caveat must therefore be sustained, as no patent can be issued to John

229 Steyer for any land comprehended * by the patent to James Smith, and without including that land or part of it, Steyer, although he may come up to, cannot be allowed to take any vacancy found beyond the tract called Birmingham Mines, by which all contiguity with it and The Plains of Moab has been totally cut off.

Whereupon, it is ordered that the said caveat of James Smith be and the same is hereby ruled good, and that the said John Steyer have leave so to correct his certificate as to take all the vacancy contiguous to The Plains of Moab, and up to, but not beyond the tract of land called Birmingham Mines; and it is further ordered, that the said John Steyer, pay all the costs to be taxed by the Register.

THEODORICK BLAND, Chancellor.

Coal, surveyed for John Hoyer the 22d day of April, 1836, for fifty acres, one undivided half part thereof assigned to Henry M. Pettit; certificate returned 2d May, 1836, and compounded on the same day in the treasury; also on the back of said certificate is the following entry: Caveated by John Steyer this 1st December, 1836; caveat entered by the Chancellor's order, to be subject to all objections as to the time of entering the same. Certificate patented to John Hoyer and Henry M. Pettit, 21st November, 1837.

Coal and Iron Certain, a resurvey upon the tract called Coal, resurveyed for John Hoyer and Henry M. Pettit, the 17th of May, 1836, for 2,756½ acres; certificate returned 2d September, 1836, and compounded on the same day in the treasury; also on the back of said certificate are the following entries: Caveated by John Steyer *per* Thomas S. Alexander, Esquire, his attorney, this 30th November, 1836; August 14th, 1837, Caveated by James Smith *per* his written order. Patented to John Hoyer and Henry M. Pettit, 22d November, 1837.

Competition resurveyed for John Steyer the 1st day of November, 1836, for 3,773½ acres, a resurvey upon the tracts called The Plains of Moab and part of Sideling Hill; certificate returned 17th November, 1836, and compounded on in the treasury the 24th April, 1837; also on the back of said certificate are the following entries: December 5th, 1836, *caveated by John Hoyer and Henry M. Pettit
230 *per* A. C. Magruder, Esquire, their attorney; August 12th, 1837, caveated by James Smith, *per* his written order within.

Register's Statement. On the 28th day of November, 1836, I made out at the request of Mr. John Hoyer, who applied to me some days before, a patent on a certificate of survey called Coal, lying in Allegany County, and containing fifty acres; this certificate was returned to the land office, and compounded on the 2nd day of May, 1836. After making out the patent on the 28th of November, I recorded it, not having any intimation that a caveat was to be entered. I also called at the Chancellor's for his signature to the patent, who was absent from town and his signature could not be obtained. On the 1st of December, 1836, several days after the patent had been made out, recorded and carried to the Chancellor for his signature, a caveat was entered by Mr. Alexander, as attorney for John Steyer. I have made this statement of the facts at the request of the Chancellor.

GEORGE G. BREWER.

Reg. Land Office, W. S., Md.

As some censure has been attached to the register for having recorded the patent before he had obtained the signature of the Chancellor, and the great seal of the State to the patent, the Register would beg leave to state, that ever since he has been in the office, both the Chancellor and the Governor have been in the habit of signing blank pieces of parchments for the register, so that if either were absent from the seat of government, a person making application for a patent, might obtain his patent without being detained upon expenses waiting for the arrival of the Governor or Chancellor for his signature. In this case the parchment was signed by the Governor before the patent was made out; the register presumes that he could at the same time have obtained that of the Chancellor, but knowing that the Chancellor was seldom absent from town, and as he has above stated, having no intimation that a caveat was to be entered, thought there could be no impropriety whatever in recording the patent; he knew too, that the Chancellor was at his daughter's, only a few miles from town, and was daily *expected home. The register would further remark, that **231** he has frequently recorded patents before they were sealed and signed by the Chancellor, and he knew it frequently to have been done by his predecessors in office, and no difficulty whatever has ever before occurred. The register hopes to be excused for making this additional statement, as he felt bound to do so in justification of his conduct.

GEORGE G. BREWER,

Reg. Land Office, W. S., Md.

John Steyer vs. John Hoyer. In the Land Office, 25th May, 1837. This caveat standing ready for hearing as to the preliminary question, whether it was entered in time or not, and the solicitors of the parties having been fully heard, the proceedings were read and considered. It must be considered as an established rule in the land office, that a caveat may be entered at any time before, but not after a patent has been actually signed by the Governor and the Chancellor.

sequences of his own omissions and neglect. It is not to be questioned that the seniority of his warrant of resurvey gave him a prior right to acquire title to all the vacancy contiguous to his tract of land called The Plains of Moab. But while the law awards preferences and advantages to the favored on the one hand, it exacts care and diligence from them on the other, to the end that full justice may be meted out to all.

The appellant in this case had an interest in virtue of the seniority in his warrant, which, with proper diligence and care, would have placed him beyond the reach of successful controversy, much less defeat; but he slept. The sluggishness of his course is not the only act of self-reproach which the appellant has to endure in this case. His errors and omissions thwart him at every step. To sum up, he made a location of his warrant of resurvey of the tract of land called The Plains of Moab, and added 121½ acres of vacancy, had a certificate of the same recorded by the surveyor, for which he paid the surveyor his fees, and then the appellant closed his survey, distinguished in the record as the certificate of the 10th June, 1836.

James Smith, one of the appellees in this case, obtained a common warrant, caused a survey to be made, and a certificate returned to the land office, paid the composition on the same, and after the certificate had lain in the land office the length of time required by its rules and regulations, (*vide* Act * of 1782, chap. 38,) obtained
235 a patent for the tract of land mentioned in these proceedings, by the name of the Birmingham Mines.

This tract of land destroyed the continuity between the tract of land first resurveyed for Steyer, called The Plains of Moab, and the tract subsequently resurveyed for Hoyer and Pettit, called Coal and Iron Certain. This survey of Smith's, one of the appellees, presents the chief difficulty to the success of the appellant, and unless it be removed, must be conclusive against his right to the land in controversy in this cause, as it is a well established rule, that the vacant land included in a resurvey must be contiguous to the original tract or tracts.

This brings us to the consideration of the integrity of Smith's title to the tract of land called the Birmingham Mines. And, first, we are constrained to say, that we do not find any proof in the record, that he procured his grant by fraud or combination, but that he obtained his warrant, caused his survey to be made, the certificate returned, and patent granted in the ordinary and usual mode.

It was urged in the argument with great ingenuity and force, that Steyer's warrant of resurvey being first in point of date, gave him an interest in the land in dispute, paramount to all others of subsequent date, and this is not denied; but suppose after his warrant issued, he had not caused a resurvey to be made, and certificate to be returned to the land office, within the time required by law, his interest would have been lost by his own supineness and neglect. So

likewise, if after Smith had returned his certificate for the tract of land called Birmingham Mines, Steyer had not neglected for six months, (the time prescribed by the Act of 1782, chap. 38, for certificates to lie before patent issues, and for the purpose of a caveat,) to enter his caveat to Smith's certificate, the Judge of the land office would unquestionably have rejected Smith's certificate, and thereby his equitable interest would have remained unimpaired.

If it be insisted that Smith was concluded from making his survey, by Steyer's outstanding warrant of resurvey, the answer * is found in the proof, that this warrant was executed, and certificate recorded by the surveyor, and that from the plot, **236.** (called in the proceedings Steyer's rough plot,) he, Steyer, not only had not, but could not locate in his resurvey the land included in Smith's survey, by reason of the interlocking of the lines of older tracts, which destroyed the continuity of the vacancy.

The knowledge conveyed by this plot, is the only evidence in the record that Smith knew of Steyer's warrant, and from this he could draw no other conclusion, than that the land included in his survey called the Birmingham Mines, was untouched by Steyer's resurvey, theretofore executed, called the Plains of Moab. The decree is affirmed.

Decree affirmed.

ANN GRAY vs. WALTER CROOK, JR.—December, 1841.

Since the Act of 1825, chap. 117, Rev. Code, Art. 71, sec. 7, on appeal in a case brought up on bills of exceptions, this Court only decides upon the prayers as made below, or the instructions which appear to have been granted.

Where a married woman, who has a separate estate during coverture, was furnished with articles suitable to her condition in life, for the use of the house in which she dwelt with her husband and family, and both before and after the decease of her husband, who was insolvent, promised to pay for them generally, and also as soon as she received her dividends from a specified portion of her estate, in an action at law, brought by the vendor after the husband's death, to recover the value of the articles so furnished, against the wife, the survivor, the Court will not instruct the jury, that there was no evidence that the private and separate estate of the defendant was ever pledged originally for the payment of the plaintiff's claim; nor, that there was no evidence that the goods were furnished at the request, or upon the promise of the defendant. (a)

Neither will the Court in such case instruct the jury that the proper jurisdiction over the claim of the plaintiff (if any existed,) was vested in a Court of equity.

(a) Cited in *Birney vs. Tel. Co.* 18 Md. 357; *Kettlewell vs. Peters*, 23 Md. 317; *Conn vs. Conn*, 1 Md. Ch. 217. When the Court cannot grant the entire prayer as made, though a portion of it in a separate form, might have

APPEAL from Baltimore County Court. This was an action of assumpsit commenced by the appellee against the appellant on the 30th August, 1837. The *defendant pleaded the general
237 issue, but it was agreed that either party might give in evidence any matter that could be offered, if the same was specially averred or pleaded; and that in the trial of the cause it is to have the same effect as if specially set forth in the pleadings. The defendant was authorized to set up any defence that could be offered in any state of the pleadings.

At the trial of the cause the plaintiff offered evidence that his account was repeatedly presented to the defendant, at least half a dozen times in the year 1835; that she promised to pay it, and never denied its correctness. On the 13th July, 1835, she stated that in a few weeks she would receive funds from her father's estate through the trustees of the Steamboat Company, and would pay the same. The plaintiff's account commenced on the 9th May, 1826, and ended on the 2nd May, 1834; it was for various articles of upholstery—as curtains, paper hangings, blinds, mattrasses, altering and making carpets, &c., furnished in the intermediate period, and amounted to \$1,029.45. The father of the defendant, by his last will and testament, devised to trustees for the sole and separate use of his daughter, the defendant, free from all control of her husband during her natural life, a variety of real and personal property, and the will was proved on the 19th June, 1828. The plaintiff further proved that the father of the defendant, Benjamin Ferguson, died in 1828, and that said defendant is the daughter of the said Ferguson, and spoken of in said will as Ann Gray, she being at that time the wife of Walton Gray, who died in January, in the year 1836; that the said defendant Ann Gray has ever since been and now is a widow. The plaintiff further offered competent evidence to prove that said Walton Gray, at the dates of the several charges in the plaintiff's account, was in bad credit, and that he petitioned for the benefit of the insolvent laws of Maryland on the 15th of November, 1820; and again on the 20th August, 1827; and again on the 12th April, 1830; and again on the 20th January, 1831; and again on the 4th April, 1834. The plaintiff further offered evidence to prove that the trustees named in the above will of Benjamin Ferguson *under
238 took the said trust, and that the portion of the separate income of the said defendant, out of the property and estate devised for her sole and separate use by the said will, amounted to \$2,602.14 in the year 1834, and in the year 1835 to the sum of \$2,381.05, and in the year 1836 to the sum of \$2,992.13; that her said separate income under the said will from the death of the said testator to the year 1834, was less than in the year 1836, but that he had such

been given, it is not error to reject the whole. *Kettlewell vs. Peters, supra.* Cf. *Leopard vs. Canal Co.* 1 Gill, 222; *Chipman vs. Stansbury*, 16 Md. 154.

separate income, which between the death of the said testator and the year 1834, and also in the years 1834, 1835 and 1836, was regularly paid to her by the said trustees, and that her said separate income has continued and still continues, and has been regularly paid to her by the said trustees up to this time. The plaintiff further offered evidence that the said last mentioned witness was the collector of the plaintiff in the years 1835 and 1836; that as such collector he called on defendant in 1835, during the life of her said husband Walton Gray, for the payment of the said account, and that she then promised to pay the same, and that he, the last mentioned witness also called on her for payment of the same two or three times in the year 1836, after the death of her said husband; that at one of the said calls the defendant promised to pay the same, and at another, she promised to pay it as soon as she received her dividends from the stock of the Union Line of steamboats; that he the witness requested her to call on the trustees for her dividends, to which she replied that it was unnecessary, as they always sent her word when her dividends were ready, and that the defendant then appointed a day when she would pay it; that the witness called on the day appointed precisely, and the defendant told him that she had sent up the money; that this was in the year 1836, and after the death of the defendant's husband, but that no payment was in fact made, to his knowledge. The plaintiff further proved that the dividends coming to the said defendant from the said Union Line of steamboats were regularly paid to her by the trustees in the years 1836, 1837, 1838 and 1839. The plaintiff further proved by a competent witness, that he the said last mentioned witness **239** assisted as a workman of the plaintiff in putting up in the house of the said Walton Gray, the defendant's husband, part of the articles charged in the said plaintiff's account. The plaintiff further proved that Walton Gray continued to transact business in a small way; that he kept a small counting-room in a store where he occasionally transacted business, but his business was not sufficient to support his family without the aid of his wife's estate.

The defendant then proved by a competent witness, that for three or four years after the death of Benjamin Ferguson, the testator mentioned in the foregoing will, Walton Gray, the husband of the said Ann, was in the receipt, and had the command of large sums of money, but that those sums arose from the dividends upon his wife's estate, which she permitted him to receive.

The plaintiff further proved that at the time the articles mentioned in the said account were furnished, the defendant was moving in a respectable circle in life, with one or more children, and that the said articles were suitable and appropriate, considering the defendant's position in society.

Whereupon the defendant prayed the opinion and direction of the Court to the jury, that there was in this case no evidence to show

that the private and separate estate of the defendant was ever pledged originally for the payment of the plaintiff's claim, and that in the absence of such testimony, the plaintiff was not entitled to recover, which opinion and instruction the Court refused to give to the jury. The defendant excepted.

The said defendant further prayed the opinion and direction of the Court to the jury, that there was no evidence in the cause to show that the goods charged in that account of the plaintiff were furnished at the request, or upon the promise of the defendant, and without such evidence the plaintiff was not entitled to recover; which opinion and direction the Court refused to give to the jury. The defendant excepted.

The said defendant further prayed the opinion and direction of the Court to the jury, that in this cause the plaintiff was not entitled
240 to recover, because the proper jurisdiction over the * claim of the plaintiff, if any existed, was vested in a Court of equity, which opinion and direction the Court refused to give. The defendant excepted.

The verdict being against the defendant, she prosecuted this appeal.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

Walsh, for the appellant, insisted—1st. That there is no evidence in the cause to show that the separate estate of the defendant was pledged in any way for the debts mentioned in the declaration; and in the absence of such evidence, there is no consideration for the subsequent promise relied upon by the plaintiff.

2nd. That there is no evidence to show that the property mentioned in the declaration was furnished at the request or upon the promise of the defendant, and without such evidence, there is no consideration for the promise after the death of the husband, relied upon by the plaintiff.

3rd. The appellant will rely upon the ground taken in the third prayer in the record, that if any claim existed, jurisdiction over it was in a Court of equity.

To show that as there was no express pledge of the separate estate of the wife in this case, the contract in judgment of law was the husband's he cited, 32 *Law Lib.* 138, 142; *Duke of Bolton vs. Williams*, 2 *Ves. Jr.* 143; *Jones vs. Harris*, 9 *Ves. Jr.* 894; *Heatly vs. Thomas*, 15 *Ves. Jr.* 596; *Bullpin vs. Clark*, 17 *Ves. Jr.* 365; 3 *Madox*, 387.

The contract of sale as to a portion of the articles furnished, took place before the separate estate was created. The promise of the appellant was no more nor less than to pay the debt of her husband, and made subsequent to the debt, and hence not founded on any consideration. 2 *Pothier*, 27. The articles furnished were not neces-

saries. 1 *Ser. & Low.* 10. This debt was always the debt of the husband. 14 *E. C. L. Rep.* 188; 11 *E. C. L. Rep.* 84; 1 *Camp.* 120; 22 *Ser. & Low.* 187; 2 *Strange*, 204.

* *Lloyd and Martin*, for the appellee, maintained—1. That there was evidence in the cause from which the jury were authorized to find that the property mentioned in the declaration was furnished at the request and upon the promise of the appellant; and that if this be so, the express promise made by the appellant, after the death of her husband, to pay for the said property, was a promise founded upon a sufficient consideration. 241

2. Assuming that the property mentioned in the declaration was furnished at the request, and on the promise of the appellant, and that after the death of her husband she expressly promised to pay for it, as stated in the first point, that then the appellee was entitled to recover his claim, although there was no evidence shewing that the separate estate of the appellant had been pledged for the said debt.

3. That the claim of the appellee resting upon an express promise, founded on a sufficient consideration, as above insisted on, it was competent for him to enforce it in a Court of law, as the appropriate jurisdiction.

The goods were furnished on the promise and at the request of the appellant—the husband a bankrupt—this fact was known and the credit was given to the wife. 5 *Taunton*, 131, '36, '44; 11 *Eng. C. Law Rep.* 301.

The jury might infer a sale on the credit of the wife; the husband never was responsible. Under a conflict of evidence the question is always for the jury. *Ferguson vs. Tucker*, 2 *H. & G.* 181; *Davies vs. Barney*, 2 *G. & J.* 282; *McEldery vs. Flannagan*, 1 *H. & G.* 320; *Pawson's Adm'r vs. Donnell*, 1 *G. & J.* 1.

A moral obligation supplies a consideration at law for an express assumpsit. 1 *Lord Raymond*, 389; 5 *Taunt.* 37; 1 *E. Com. Law*, 10; *Barnes vs. Hedley*, 1 *Taunt.* 174; *Early vs. Mahon*, 19 *John.* 147; 3 *E. Com. Law*, 260; 4 *Bing.* 459; 15 *Eng. C. Law Rep.* 39; 12 *E. C. Law Rep.* 184; 2 *Carr. & Paine*, 383; 7 *Conn.* 57; 2 *Binn.* 591; 3 *Pick.* 207; *Wennall vs. Adney*, 3 *Bos. & Pull.* 249, notes.

* But for the coverture, the law would have implied a promise to pay. Her promise relates to the original request. *Oatfield vs. Waring*, 14 *John.* 188; *Jackson vs. Holloway*, 7 *John.* 83. 242

The act of the wife in this case after the death of her husband binds her. *Lee vs. Muggeridge*, 1 *Ves. & Bea.* 122, 123.

The principle of all the cases cited is, that a moral obligation to pay a debt is a sufficient foundation for an express promise to pay. The contract here was with the wife of an insolvent husband. The goods were furnished upon her request for the use and accommodation of herself and family, suitable to her condition in life, and it was consummated by a pledge of her private separate estate. The goods

were a gain to the promisor, a loss to the promisee, the two great ingredients of a contract at law. *Wennall vs. Adney*, 3 *Boss. & Pull.* 246, notes.

The express promise to pay is a distinctive feature in this cause. It confers jurisdiction on a Court of law. *Edwards vs. Davies*, 16 *John.* 284, note a.

Richardson, for the appellant, in reply, cited 2 *Pothier*, 27, *Evans'* notes; *M. E. Church vs. Jacques*, 1 *J. C. R.* 450; 14 *E. C. Law*, 188; 11 *E. L. Law*, 84; 1 *Campb.* 120; 22 *Serg. & Low.* 187; 2 *Strange*, 204; 11 *E. C. L.* 301; *Lee vs. Muggridge*, 5 *Taunt.* 37; 2 *Roper on Hus. & Wife*; 32 *Law Lib.* 137, 142; 1 *Strange*, 94; 7 *H. & J.*; 2 *L. Ray.* 1055; 7 *Conn. Rep.* 64.

BY THE COURT—

Judgment affirmed.

THOMAS HUTCHINS vs. THOMAS HOPE (a).—December, 1841.

If the answer swears away or denies the equity stated in the bill, the injunction granted on the bill will be dissolved: but if the equity be admitted or is not denied, or if new matter is set up in the answer by way of avoidance of any material allegation in the bill, the injunction will be continued until the final hearing or further order. (b)

An answer alone will not support a distinct fact set up in it by way of avoidance, and upon the motion to dissolve an injunction is not considered as established. Such a defence must be made out by proof. (c)

245 * The plea of limitations in an answer is not a sufficient ground for a dissolution of an injunction on motion. (d)

Upon an appeal from the continuing of an injunction, the order being affirmed, the cause is remanded for further proceedings.

APPEAL from the Court of Chancery, and from a refusal to dissolve an injunction upon motion.

The appellee in this case, on the 1st March, 1836, filed his bill on the equity side of Harford County Court, praying for an injunction and subpoena against the appellant.

The bill alleged, that about the year 1815, the late Thomas Hope, departed this life, leaving a considerable real and personal estate, and that the deceased made his last will, which has been admitted to probat by the Orphans' Court of said county, by which he devised and bequeathed among other things, one-third of his personal property, after payment of debts and legacies, to his widow Hannah

(a) See the second appeal in this case in 7 *Gill*, 119.

(b) Cited in *Hamilton vs. Whitridge*, 11 *Md.* 144; *State vs. Railway Co.* 18 *Md.* 219. See *Dougherty vs. Piet*, 52 *Md.* 425.

(c) See *Ringgold vs. Ringgold*, 1 *H. & G.* 11.

(d) Approved in *White vs. Flannigan*, 1 *Md.* 550.

Hope, the mother of your orator; and bequeathed to three of his daughters the sum of \$600 each, and the residue to your orator, and made your orator his executor; all which will more fully appear by reference to a copy of said will herewith exhibited as part of this bill, and marked exhibit A; that your orator obtained letters testamentary from said Orphans' Court on said will, and being residuary legatee, gave bond for the payment of debts and legacies; that the said Hannah, the mother of your orator, being devisee for life under the will aforesaid, of one-third of the farm which was devised to your orator, continued to reside with him after the death of his father, and he cultivated the entire farm under an agreement to allow her a reasonable rent; that sometime after the death of your orator's father, the said Hannah was anxious to have her share of the personal estate devised to her, and she and your orator agreed that the whole should be valued, and that articles of property at such valuation should be delivered to her, and in pursuance of this agreement, two gentlemen of the neighborhood, to wit, Abel Alderson and William Nelson were selected, and they valued the entire personal estate left by the father of your orator, at the sum of \$3,306.04½; and the mother of your orator being *anxious and desirous to have four of the negroes, two of the cows, and a 246 horse, your orator delivered the same to her, although the aggregate value of said articles so delivered, according to the valuation set upon them by the gentlemen aforesaid, and according to their real and fair value, was equal to one-third of the whole personal estate left by the said Thomas, deceased, without any deduction for the legacies left to his said daughters, by which the said Hannah was overpaid her legacy under said will, \$600, without making any deduction for funeral expenses, debts, or the expenses of the administration; that at the time this was done, and the said Hannah was so overpaid, it was done through inadvertence and mistake by your orator, and your orator is satisfied that the said Hannah was not conscious that she was over-paid, she being at the time an old and infirm woman, and as your orator believes, incapable of adding together the value of the articles she received, or knowing what proportion the amount bore to the value of the whole property. So matters remained, and the mother of your orator continuing to reside with him for several years, when she demanded payment of your orator for the rent of her portion of the farm. When she made the demand of rent, your orator was fully conscious that he did not owe her anything without reference to the claim arising from over-paying her legacy but the trouble and expense to which your orator had been subjected in keeping her, and her negroes and stock, was more than equivalent to the use and rent of her interest in the land. The mother of your orator, however, being as before stated, very far advanced in age, and very infirm in body and mind, and being peevish and fretful and incapable of understanding her rights, your

orator, in mere indulgence to her caprices, to sooth and comfort her, gave her his three several bills obligatory, two for one hundred and sixty dollars each, and one for two hundred dollars payable one year after the death of the said Hannah, without interest, which said bills obligatory all bear date on the 12th of August, 1822; and your orator expressly charges, that when he gave the said notes, his motives were solely to pacify and quiet his aged * and infirm parent, and not from any consciousness of his indebtedness; and he felt assured too, that the debt would be extinguished by boarding and keeping his mother, her negroes, and stock, for the residue of her life, and with that view he made the notes payable after her death; this arrangement satisfied and quieted the old lady at that time, and as your orator knew it was his sacred duty to take care of and keep his mother, whether she had his notes or not, and as he always intended that she should want no aid or comfort which he could give, he felt little or no concern about the matter. Your orator further shews, that his mother continued to live with him, sometimes as one of his family, and sometimes keeping a separate establishment in part of his house as suited her therein for the time, and sometimes keeping thereon four cows and several negroes, all of which was kept and supplied by your orator from the time the said notes were given up to the death of the said Hannah, which occurred about the 12th February, 1833; that during the period from the date of said notes or bills till the death of said Hannah, your orator paid her taxes, and the various items of charge against the said Hannah for boarding herself, paying her taxes, and keeping her servants and stock, as will more fully appear by a particular account thereof herewith shewn as part of this bill, and marked Exhibit B, which account your orator avers to be just and true. Your orator further shews, that during the time the said account was accruing, your orator never urged the said Hannah for any adjustment of their accounts from motives of kindness to her, as she was incapable of settling or adjusting accounts, and any demand made upon her would, in her state of infirmity, have rendered her unhappy; but your respondent was well aware that she owed him a large sum of money, but was also under the belief that her property, at her death, would go to indemnify him as far as it was sufficient for that purpose, and if insufficient, it would not place him in any worse condition, inasmuch as he would have kept his mother, and indulged her in the same manner that he did, if she had had no property at all. Your orator further shews, that to his surprise he learned, * after the death of his mother, that she had assigned the said three bills obligatory to one Thomas Hutchins, of said county, without any valuable consideration, and since the death of said Hannah, the said Thomas Hutchins hath instituted suits on said bills obligatory, and at the August Term of Harford County Court, 1833, recovered three judgments thereon against your orator, as will more fully appear by

short copies of said judgments herewith exhibited as part of this bill, and marked Exhibit C. Your orator further shews, that at the time the said notes or bills were given, the said Hannah was indebted to your orator in the sum of six hundred dollars, for and on account of the over-payment of her legacy by your orator as executor of his father, but that he could not plead this as a set-off to the suits brought on said notes by law, by reason of the character of the claim, it being a claim exclusively cognizable in a Court of equity; and your orator also charges, that before he had any notice of the assignment of said notes or bills obligatory, that the said Hannah was indebted to him in twice their amount for boarding and keeping her and her negroes and live stock, and money paid for her taxes, and that he could not on account of technical difficulties, make the said account available as a set-off, in the action at law. Your orator also charges, that the said assignments of said bills obligatory, were made without any valuable consideration being paid for the same by the said Thomas Hutchins, and at the time they were made, the said Hannah was indebted to your orator in a sum greatly exceeding their amount; and also charges, that the said Hannah did not leave property sufficient to pay the claims due to your orator; that your orator is the administrator of the said Hannah, and the estate which came to his hands is insufficient by a large sum to pay her debts. Your orator further shews, that the said Thomas Hutchins, although he knows that nothing was due to said Hannah on said notes, and that the claims on the same had been extinguished thrice over by over-paying the legacy as aforesaid, and by the account aforesaid, yet he still threatens to execute the judgments aforesaid against your orator, all which is contrary to equity, and tends to the wrong and injury of your orator in the premises.

• With this bill the appellee filed the exhibits mentioned in it, with an injunction bond, in the penalty of \$1,200. By the **249** short copies of the judgments, one was upon verdict and the other two by default.

The County Court, (ARCHER, C. J.) granted an injunction, which was issued and served.

The defendant answered the bill and alleged, that it is true that Thomas Hope, Senior, the father of complainant, departed this life, having made his last will in manner and form as in said bill is stated; that he thereby devised to the late Mrs. Hannah Hope, (his widow who is since deceased,) an estate for life in the one undivided third part of the plantation whereon he resided, and which he devised to complainant in fee, subject to said life estate; that he also devised to the widow, during her life, the use of part of the dwelling-house, and one-third part of his personal estate, after payment of his debts, (which were very trifling,) and the legacies of six hundred dollars each, bequeathed by him to his three daughters; that he bequeathed the residue of his personal estate to complainant, whom he appointed his

executor, and that said will, of which exhibit A is admitted to be a correct copy, was duly admitted to probate, and that the complainant took the whole estate into possession, and gave bond to pay debts and legacies. Respondent admits, that on the distribution of the estate of complainant's testator, the widow received the specific articles mentioned in said bill, and therein charged to have been delivered to her, but he denies that she received any more in value than her just proportion, or more than she was legally entitled to have." Complainant's testator died seized of a large quantity of real estate, besides the plantation in which as aforesaid, he devised his widow a life estate for one-third, to wit: the farm devised by him to his son Ezra Hope, containing, &c., and the farm devised by him to his son William, containing, &c., as by the will will appear; in all which she was entitled by law to her right of dower, (provided she renounced all interest under the will,) and also to the one-third of the personal estate before payment of the legacies, so that her interest in the estate * of the deceased under the will, was much less
250 than it was independently of and in opposition to it. Mrs. Hope, as this respondent knows and avers, had intended to renounce all interest under the will, and take all that the law would allow her, and in order to induce her to change this determination, complainant, as executor and residuary legatee, did as respondent alleges, offer and agree, that if she would stand to and abide by the will, she should have the one-third of all the personal estate of the testator, before payment of the debts and legacies; accordingly and in order to carry this agreement into effect, Abel Alderson and William Nelson, the gentlemen mentioned in said bill of complaint, appraised all the personal property of the testator, and complainant delivered over to Mrs. Hannah Hope the articles specified in said bill and charged to have been delivered, with a full knowledge of their real value, and of the proportion they bore to the value of the whole personal estate, and not under any mistake whatever by the complainant or the said Hannah, who was not at that time very old and infirm, and unable to ascertain the value of the property she got, but on the contrary, very well understood her own rights and the responsibility of the complainant to her, and they settled the same as a strict business transaction, and acted upon it as finally adjusted from that time, being not long after the death of her husband in 1815, up to the period of the death of said Hannah Hope. Eighteen or twenty years have now elapsed since the above mentioned distribution of the estate of Thomas Hope, deceased, was made, and during all that time (until of late,) complainant has acquiesced in the settlement which was made by himself, and never sought or demanded to have any part of the property so delivered, or its value returned or refunded, although in his settlement with Mrs. Hope for the rents of her lands, he had frequent opportunities of correcting the mistake, if any such had existed. But on the contrary, he gave her his notes under seal

for the full amount of the rent due her, without making any deduction on account of the alleged over-payment of her legacy, and now attempts to avoid the payment of said notes by an averment that he never * intended to pay them when he gave them. Respondent submits to this Honorable Court, whether complainant **251** should be permitted now, after the death of Mrs. Hope, and without any allegation of fraud, and without having discovered any new fact of which he was not before conversant, to open a transaction on which he has slept for eighteen years, to the prejudice of a third party to the settlement. Respondent claims the benefit of the Act of Limitations, passed and enacted by the General Assembly of Maryland in the year seventeen hundred and fifteen, and relies upon it as barring forever all demands of complainant for the alleged over-payment to Mrs. Hannah Hope of her legacy, and as also a full bar to the whole of the pretended account exhibited by the complainant with his said bill. Further answering respondent admits, that complainant and his mother, Mrs. Hannah Hope, lived together in the house which was owned by them jointly under the will, and that complainant occupied and cultivated the entire farm, including the part devised to his mother, which was never laid off, but was an undivided third of the whole, and that the three several bills obligatory referred to in said bill of complaint, were given by complainant to Mrs. Hope, in payment of the rent due by him for the use and occupation of her portion of the farm, from the death of complainant's father to the year eighteen hundred and twenty-one, comprising a period of about six years; for the two first of which he allowed her the rent of one hundred dollars per annum, and for the other four years eighty dollars per annum. But respondent denies that at the time of giving said bill obligatory, complainant had any claim or demand against Mrs. Hope for the trouble and expense of boarding and providing for her, (as he alleges in his bill,) or on any other account whatsoever, which he was then entitled to deduct from the money rent reserved for the use of her lands, or which he can now set-off against said bills obligatory. He denies that any debt or claim for the boarding of Mrs. Hope, has accrued either before or since the execution of said bills obligatory, which has not been fully adjusted and satisfied. For in point of fact respondent says, that the boarding of Mrs. * Hope was taken into consideration in the settlement for the rent due her, he having agreed to furnish her **252** with boarding in addition to the annual rent reserved in money, as the consideration for the use and occupation of her lands, and then said notes or bills were given by him for the net balance due her in money, over and above the expense of her board, and that the said notes were not given as is falsely alleged, to gratify the caprice of a peevish and fretful old woman, but on payment of a just and honest debt, which the complainant then owed to his mother, and sought by all his artifices to reduce and diminish, as the relinquishment of in-

terest shews, as well as the indulgence in time. As conclusive evidence whereof, respondent begs leave to refer your Honor to articles of agreement entered into between said Hannah Hope and complainant, in April, eighteen hundred and eighteen, at which time the terms on which complainant farmed and occupied her third of the plantation were first reduced to writing, and he herewith files a copy of said articles marked respondent's exhibit A, which he prays may be taken as a part of this answer. Prior to this time complainant had rented of Mrs. Hope by parol, and there is no written evidence of their contract. But these articles contain and shew the terms on which the complainant had farmed the premises previously to the year eighteen hundred and eighteen, and in every way correspond with the verbal lease under which he held from the death of the late Thomas Hope, until the date of these articles of agreement, excepting that the rent reserved in money was then reduced from one hundred dollars per annum to eighty dollars. From these articles of agreement, it appears that complainant was to occupy and farm the whole of the plantation of which as aforesaid, Mrs. Hope owned an undivided third, and was to pay her eighty dollars in money, and was also to furnish her amongst other things, particularly specified, with "house room, flour, meal, meat and fowls, for the use of her table, and a horse to ride on, &c." And respondent avers, that these articles though only originally intended, as would appear from their face, to have effect for three years, remained as a continuing and subsisting agreement until * Mrs. Hope's death, except-

253 ing as altered in some trivial particulars by the writing annexed thereto, bearing date August, eighteen hundred and twenty-two, a copy of which is also herewith filed as part of this answer. As regards the boarding of the negroes belonging to Mrs. Hope, with which complainant has charged her in the account filed by him marked exhibit B, respondent denies that it is a just and proper charge, and says, that during all the time for which she is charged with their boarding, these negroes were almost constantly in the employ of complainant, and were used by him as his own; that the value of services rendered by them was far more than equivalent to the expense of keeping them, and if there was an indebtedness on either part in regard to said negroes, it was an indebtedness on the part of complainant for their hire; but as he was her son, Mrs. Hope never made any charge against him for their services, unless she may have taken it into consideration in the final distribution of her property among her children. Further answering respondent says, that he married one of the daughters of Mrs. Hannah Hope, and he admits that in less than a year after the execution of said bills obligatory, she signed and delivered them over to respondent as a gift to him and his wife, without any other consideration than the natural love and affection she bore them, and her wish to make, what she claimed, a fair and proper distribution of her property before her

death, and of which said distribution the complainant was not only fully apprised, but as party thereto, and accepting gifts and bounties under the same; against the fairness of this distribution, the complainant, Thomas Hope, should be the last to make complaint, for, independently of his own mother's right to dispose of her property as she pleased, respondent avers, that she gave complainant the use of her negroes during her life without hire, one hundred dollars in money and a valuable horse, and released him from the payment of interest on the bills obligatory, referred to by complainant, from their date until one year after her death. These furnish a fund sufficient to discharge all the fancied claims against Mrs. Hope, and until it is exhausted, he can have no * pretext for demanding payment 254 from her assignees. But respondent denies, that the assignment was made to him without the knowledge of complainant, who, as he avers, had notice of the fact either at the time or within a very short period afterwards, and less than a year after it was made, and before then, of her intention to make said assignments. He denies the allegation, that Mrs. Hope did not leave sufficient property to pay her just debts, and states his belief, that she left no debts unpaid except perhaps her shoemaker's bill, to the amount of a few dollars, or some such trifling matter. And he denies and resists the right claimed by complainant in his bill to set-off against or deduct from said bills obligatory, or from the judgments which respondent as assignee has obtained thereon in Harford County Court, any debt, claim or demand, which he either has or claims to have against Mrs. Hope, accruing subsequently to the assignment, and respondent refers to the solemn oath of the complainant's mother annexed to the said bills obligatory, as showing that no just discounts, off-sets, or payments in regard to them, existed at the time of the said assignments. But as a full and conclusive answer to all said bill of complaint, other than and except such parts thereof as relate to the alleged over-payment to Mrs. Hannah Hope of the legacy bequeathed to her by Thomas Hope, Senior, and complainant's right to set-off said alleged over-payment against these bills obligatory, referred to in said bill of complaint, and which is itself barred by the Statute of Limitations and the lapse of time, herein before relied on as a part of this answer, respondent saith, that he instituted suits at law in Harford County Court on the three several bills obligatory, mentioned in said bill of complaint, and at the August Term of said Court, in the year eighteen hundred and thirty-five, obtained judgments thereon, and that at the trial of said suits at law, all and singular the matters and things and circumstances in said bill set forth, and on which complainant grounds his prayer for relief in the premises, except, as aforesaid, so much of said bill as relates to Mrs. Hope's legacy, were presented by the pleadings and issues joined by the parties, and were fully * weighed, considered and determined, as by copy of the record thereof herewith filed as part 255

of this answer will more fully appear. Respondent denies, that complainant was prevented by technical difficulties from availing himself of said circumstances as a defence to said suits at law, but on the contrary avers, that all and singular said matters and things, except as herein before excepted, being the pretended claim for over-payment of legacy, were fully brought before the Court and jury, and said suits at law were decided, and said judgments were rendered in favor of this respondent, upon the true and substantial merits of the cases, and agreeably with the laws of the land and the equity and right of the matter. Respondent thereupon submits to this Honorable Court, whether the said questions having been once decided in suits between the same parties, by a Court of competent jurisdiction, complainant can again put the same matters in issue, and whether he is not forever barred of the relief prayed in his said bill of complaint in relation to said matters.

The Exhibit A, referred to in the answer, was not filed in the Court of Chancery.

The defendant filed with his answer a transcript of the record in his action at law against the complainant, upon the complainant's bond to Hannah Hope, assigned to the defendant, in which the said Thomas Hope had pleaded payment, and account in bar filed; the plaintiff at law replied, non-payment and issue; account in bar denied, and issue; limitations to account in bar, rejoinder and issue; accord and satisfaction to account in bar, general rejoinder and issue. The account in bar filed by Thomas Hope, the defendant at law, was from 1823 to 1833, for the boarding of Mrs. H. Hope, her servant woman and child, and keeping two cows, taxes, &c., crediting her annually with rent of her land; and also charged her with \$600 over-paid in the distribution of Thomas Hope, Senior's, estate. It appeared by the bill of exception, that the defendant Thomas Hope, at the trial of the action at law, had offered proof that Mrs. Hope was indebted to him in the sum of six hundred dollars for money over-paid her on account of a legacy *bequeathed to
256 her by her late husband, of whose will the defendant was executor, and that upon the objection of the plaintiff at law, Thomas Hutchins, to the admissibility of the evidence so offered, it was rejected by the County Court.

Upon the suggestion of the complainant, this cause was removed to the Court of Chancery, where the defendant moved for a dissolution of the injunction. On the 26th of April, 1841, the Chancellor [BLAND] continued it until final hearing or further order. The defendant in equity appealed to this Court.

The appeal was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Constable, for the appellant. *O. Scott*, for the appellee.

SPENCE, J. delivered the opinion of the Court. If the answer swears away or denies the equity stated in the bill, the injunction will be dissolved; but if the equity be admitted or is not denied, or if new matter is set up in the answer by way of avoidance of any material allegation in the bill, the injunction will be continued until the final hearing or further order.

In this case, one of the material allegations in the bill is, that in the settlement of the estate of Thomas Hope, made between the complainant, who was executor of said testator, and Hannah Hope, who was a legatee under the will of Thomas Hope, who assigned the notes mentioned in these proceedings to the respondent, that from inadvertence and mistake, he the said complainant over-paid the said Hannah Hope the sum of six hundred dollars.

The answer admits, that Mrs. Hope received the property mentioned in this allegation in the bill, but denies that it was any more than she was entitled to, and by way of avoidance of the same makes this averment: "Mrs. Hope, as the respondent knows and avers, had intended to renounce all interest under the will, and take all that the law would allow her, and * in order to induce her to change 257 this determination, the complainant as executor and residuary legatee, did, as respondent alleges, offer and agree, that if she would stand to and abide by the will, she should have one-third of all the personal estate of the testator, before payment of the debts and legacies."

This agreement set up in the answer, is a distinct fact, set up in avoidance or discharge, and the answer alone will not support it. In such case the defence must be made out by proof. *Ringgold vs. Ringgold*, 1 H. & G. 81.

The plea of limitation was relied on in the argument as a sufficient ground to dissolve the injunction; but we think differently, and therefore affirm the Chancellor's order, and remand the cause, that such further proceedings may be had therein as the nature of the case may require.

Order affirmed, and cause remanded.

NIMROD CROMWELL vs. THE STATE.—December, 1841.

The reservation, "further and other remedy may be provided by law in the premises as the Legislature may enact," contained in the Act of 1804, chap. 55, sec. 3, a part of the amended Constitution of this State, relating to the removal of criminal causes, was intended specifically to authorize a detailed system, prescribing, the "manner and terms," to be observed by parties entitled to the right. (a)

(a) Cited in *Griffin vs. Leslie*, 20 Md. 18, and *Dawson vs. Contee*, 22 Md. 29. In the former case it is said, that the privilege of removal is to be liberally construed; and in the latter that the judgment on a motion to change the venue is the subject of appeal.

The Act of 1805, chap. 65, sec. 49, is not repugnant to the Act of 1804, chap. 55, sec. 3.

It is only a plain and palpable contradiction of their enactments, that will induce the Court to say that one Act of the General Assembly violates another. (b)

WRIT OF ERROR to Baltimore City Court. Indictment against the appellant for an assault and battery, found at February Term, 1841. At June Term, 1841, the traverser suggested to the Court in writing and upon oath, that he could not have a fair and impartial trial in Baltimore City Court, and prayed a removal of the record to some adjoining County Court. But the Judges, [BRICE, C. J., NISBET, and WORTHINGTON, A. J.,] no other proof being offered to them but * the suggestion and affidavit aforesaid, refused to **258** order the removal, upon which the appellant sued out a writ of error.

By the amended Constitution, 1804, chap. 55, sec. 3, it is enacted, that if any party presented or indicted, &c., shall suggest in writing to the Court in which such prosecution is depending, that a fair and impartial trial cannot be had in such Court, it shall and may be lawful for the said Court to order and direct the record of their proceedings in, &c., to be transmitted to the Judges of any adjoining County Court for trial, &c., provided that such further and other remedy may be provided by law in the premises, as the Legislature may direct and enact.

By the Act of 1805, chap. 65, sec. 49, it is enacted, that no prosecution now depending or hereafter to be instituted, shall be removed, unless after indictment being found, the person or persons against whom said indictment shall be found, shall suggest in writing, supported by affidavit or other proper evidence, that a fair and impartial trial cannot be had, that then it shall be lawful for the said Court, in their discretion, to order and direct the record, &c., to be transmitted to the Judges of the adjoining County Court, before whom, &c.

By the Act of 1809, chap. 138, sec. 20, where a party suggests by affidavit, that a fair and impartial trial cannot be had in the Court where the indictment is found, "such Court shall order the record of the proceedings in said prosecution to be transmitted to the Court having criminal jurisdiction of any adjoining county," &c.

By the Act of 1840, chap. 211, passed 8th March, 1841, it was enacted, "that so far as relates to Baltimore City Court, the 20th section of the Act of 1809, chap. 138, entitled, an Act, &c., be and the same is hereby repealed, and that the 49th section of the Act of November Session, 1805, chap. 65, entitled, an Act, &c., be and the same is hereby declared to be in full force and effect, so far as relates to said Baltimore City Court.

(b) See *Canal Co. vs. R. R. Co.* 4 G. & J. 7, note (n).

This writ of error was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

T. Y. Walsh, for the appellant, maintained, that the Act of 1840, chap. 211, was unconstitutional so far as it invests the Judges of the City Court with discretion to refuse to remove a cause.

That the Act of 1805, chap. 65, was also unconstitutional; that the Act of 1804 was imperative on the Courts, until the Legislature provided some other remedy for a party indicted, to aid him in and secure to him the privilege of removing a cause. The Act of 1805 was no remedy; it gave no relief to the prisoner; it was a restriction upon his rights under the Constitution as amended in 1804.

Richardson, for the State: I take no objection to this writ of error, that it was sued out before final judgment; before sentence. There is an important practical question involved in it, which we are desirous of having finally decided, and as speedily as may be.

If a broad privilege is confirmed by the Act of 1804, I agree that it cannot be restricted by a single Act of the Legislature. But is the 49th section of that Act obligatory mandatory upon the Courts of original jurisdiction, or is it merely permissive. It says, it shall and may be lawful for the Courts to remove—is this imperative or discretionary? It must be discretionary, for the Legislature is authorized by a single Act, without altering the Constitution, to provide another and further remedy in the premises. What is such further and other remedy? A remedy for what? That the Legislature may impose some restriction is decided. 6 H. & J. 270. It means, that the Legislature may remedy the evils resulting from the change of the Constitution as provided by the Act of 1804, and hence the Act of 1841 is clearly constitutional.

CHAMBERS, J., delivered the opinion of this Court. The Court consider the case of *Dashiell and the State*, 6 H. & J. 268, conclusive upon this question. It is there said “the Act of 1805 does not attempt to deprive the party of this right, but only points out the manner and terms upon which it shall * be enjoyed. It is not repugnant to the Act of 1804, but only directs in detail how **260** the general provisions of that Act shall be carried into operation.”

Without the aid of such decisive authority, it would require the most plain and palpable contradiction in the two enactments to force upon the Court the conclusion, that the Act of 1804 was violated by the provisions of the Act of 1805, passed as it was by the same Legislature who adopted and ratified the Act of 1804, thereby making it a part of the Constitution, not only at the very moment when they had thus re-enacted it, but by the very Act which was designed to carry out into full operation and effect the system which it was intended to introduce.

We are driven to no such imperative necessity, but are of opinion, that the reserved power to legislate further in the premises, was in-

tended specifically to authorize a detailed system, prescribing the "manner and terms" to be observed by parties who are entitled to the right.

Judgment affirmed.

THE STATE OF MARYLAND *vs.* JOHN PRICE.—December, 1841.

Where the enacting clause of a penal Act contains an exception, it is not indispensable that an indictment framed under it should set forth an express negation of it.

Where the charge preferred *ex natura rei*, as conclusively imports a negation of the exception, as if such negative had been in express terms, no rule of construction requires more.

Where exceptions are in the enacting part of a law, it must appear in the charge, that the defendant does not fall within any of them. A case must be averred which brings the defendant within the Act. That a faro table is not a billiard table, is a fact of such notoriety as to be within the knowledge of the community at large; and hence there is no presumption of law or fact which will prevent the Court from judicially knowing what a faro table is. (a)

If a billiard table, which is excepted from the penalties of the Act, were in fact used as a faro table, *ipso facto*, it would lose the immunity conferred upon it.

261 APPEAL from Baltimore County Court. * This was an indictment charging that the appellee on, &c., at &c., "unlawfully did keep a certain gaming table called a faro table, at which said gaming table, unlawfully kept as aforesaid, the game of faro was then and there unlawfully played for money, against the Act of Assembly in such case made and provided, and against," &c.

The traverser demurred to the indictment, in which the State joined, and the County Court sustained the demurrer. The case was brought up on writ of error by the State, and was argued

Before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

The Act of 1826, ch. 88, under which the indictment was found, enacted, that "every person who shall be duly convicted of keeping any E. O. Table, or any other kind of gaming table, (billiard tables excepted,) at which the game of Pharo, Equality, or any other game of chance shall be played for money, shall for the first offence forfeit and pay," &c.

Boyle, (D. A. G.) for the State.

Handy, Pitts, and Richardson, for the appellee. The negative words of the statute found in the enacting clause must be followed

(a) Cited in *Rawlings vs. State*, 2 Md. 211; *Parkinson vs. State*, 14 Md. 198; *Kearney vs. State*, 48 Md. 24. See also, as to indictments upon statutes, *State vs. Cassel*, 2 H. & G. 308; *State vs. Nutwell*, 1 Gill, 54; *Bode vs. State*, 7 Gill, 326; *Kellenbeck vs. State*, 10 Md. 431; *State vs. Elborn*, 27 Md. 483; *Hollohan vs. State*, 32 Md. 399; *Davis vs. State*, 39 Md. 385.

in the indictment. 1 *Chitty Crim. Law*, 190, 192; 1 *Burr.* 152; 1 *D. & E.*, 84; *Archb. Crim. Prac.* 20, 21. The indictment should conclude against the form of the Act, and not against the Act of Assembly. 2 *East Rep.* 332; 7 *Massa.* 9. This offence was unknown to the common law, neither keeping a table nor gaming was punishable. The offence at common law was keeping a gaming house, a nuisance tending to the destruction of good morals. This is a statutable offence, and the exception in the body of the Act is a part of the legislative description of the thing intended to be prohibited, and hence the very words of the Act * ought to be used. 1 *Barn.* 262 and *Ald.* 99; 1 *Russ. and Ryan*, 321; 7 *D. & E.* 18. Hence, the exception ought to be negatived. The Court cannot judicially know what a faro table is. They cannot know that it is not a billiard table, nor can they look out of the indictment for the description of the offence.

DORSEY, J. delivered the opinion of this Court. The correctness of the judgment of the County Court, it is asserted by the appellee, is fully established by the general principle, as stated in *Archb. Cr. Pl.* 21, and other elementary writers upon the subject, "that if there be any exception contained in the same clause of the Act, which creates the offence, the indictment must shew, negatively, that the defendant or subject of the indictment does not come within the exception." If the meaning of this rule be, as is contended, that the indictment must contain an express negation of the exception, it is not warranted by a fair construction of the opinions of the Court, in the cases referred to, as its basis. In announcing such a principle, the Court must be understood as asserting it in reference to the cases then before it, and those of a similar character. In all of which it will be found that, but for such negation, the guilt of the accused would not conclusively appear. Under the exception he might be innocent, although every allegation against him be fully proved. The rule, in such cases, and in such only has it ever been declared from the bench in any reported case that we can find, is undeniably true. But to apply it to a case like the present, where the charge preferred, *ex natura rei*, as conclusively imports a negative of the exception, as if such negative had been in express terms, would violate the soundest principles of construction; and give to the rule an universality of operation which its terms do not import, and was never contemplated in the decisions or commentaries to which it owes its birth. The true rule upon the subject is thus given by Lord Mansfield, in *Rex vs. Jarvis*, *Hil. Term*, 30 *Geo.* 2, reported in note (k) in *King vs. Stone*, 1 *East*, 644, "where exceptions are in the enacting part of a law, it must appear in the charge, that the defendant does not * fall within any of them." And in *Spiers* 263 vs. *Parker*, 1 *T. R.* 141, "the plaintiff must aver a case, which brings the defendant within the Act." To sustain the doctrine con-

tended for by the appellant—if a statute were passed, making “the malicious killing of cattle, except horses,” a felony: and an indictment charged the malicious killing of a cow, it would be defective, unless it negatived the exception, by stating that the cow was not a horse. An allegation so useless, not to say absurd, cannot be required by any technicality either in civil or criminal pleading.

But it is urged by the counsel of the appellee, that the Court cannot judicially know what a billiard table is, or that it is not the table at which the game of faro is usually played. To such a proposition we cannot yield our assent. We know of no recognized presumption either of law or fact, that imputes to the Court an ignorance of a matter, like the present, of such notoriety as to be within the knowledge of the community at large. And we feel perfectly warranted in assuming to ourselves such a knowledge upon the subject, as enables us to declare that, in excepting billiard tables, the Legislature did not design to authorize their being kept for the playing thereon, of the game of faro for money; (the authority so to use them being a corollary of the doctrine contended for by the appellee,) but that the moment they are so appropriated, they, *ipso facto*, *pro hac vice*, lose the immunities conferred on them by the exception; and ceased to be billiard tables in the eye of the law. When, therefore, the charge in the indictment demonstrates, that the gaming table complained of could not be a billiard table, was it not superfluous to have added an allegation to that effect?

The objection taken to the indictment, that it does not describe the offence with sufficient certainty and conformity to the language used in the Act of Assembly, cannot be sustained. The offence is charged in the very words of the Act of Assembly, by which it is created, with the additional words, “called a faro table,” which detract nothing from the sufficiency of the description of the offence, otherwise set forth in the indictment. The *prohibition in

264 the Act of Assembly, is the keeping of a gaming table, at which the game of Pharo, Equality or any other game of chance shall be played for money. The charge in the indictment is, that the accused “unlawfully did keep a certain gaming table, called a faro table, at which said gaming table, unlawfully as aforesaid, the game of faro was then and there unlawfully played for money.” The only difference between the language of the Act and that of the indictment is, that in the latter it is alleged that the gaming table was called a faro table. Such an allegation in no wise impairs the indictment, which is perfect without it; and even if it be not wholly rejected as surplusage, its only possible effect would be to impose upon the prosecution the necessity of proving, at the trial, that the gaming table complained of was called a faro table. Totally unlike the present is the case of *Rex vs. Craven*, 1 *Russ. & Ryan*, 14, relied on in support of this objection. There the felony, created by the statute, was the stealing of a bank note, or

promissory note, for the payment of money. The charge in the indictment was, the stealing of "a certain note commonly called a bank note." And the Court say, "that in the first special description of the property stolen, it being stated only to be a note, was not sufficient; the words of the Act being bank note or promissory note for the payment of money." And that the addition "commonly called a bank note," "did not aid such original wrong description." In the case at bar, there was no original wrong description which required aid from the words that were added. On the contrary, the indictment described with technical accuracy, in the very language of the Act of Assembly, the offence committed, and such description was neither aided nor impaired by the additional words unnecessarily used.

The judgment of the County Court is reversed and the cause remanded thereto. *Judgment reversed, and procedendo awarded.*

* WILLIAM SLATER vs. WILLIAM M. F. MAGRAW and 265
GEORGE H. DUTTON.—December, 1841.

Where the language of a contract is equivocal and ambiguous, regard is always to be had to the subject-matter about which the parties are stipulating, and such a construction of the terms used is to be adopted, as will carry their intention fully into effect; but where a party expressly contracts as security, he is not to be treated as principal.

The rule is well settled, that where the interest of the parties is several, and the language of the covenant is joint, the right of action founded upon it is several. Where the interest is joint, the action must be joint, though the covenant in terms appears to be joint and several. (a)

The breach assigned in covenant should be within the terms or the legal effect of the instrument declared on.

Where M. gave his receipt under seal for the purchase money of a slave for a term of years, sold by him: and in the same instrument stipulated to give a good title when called on; and D. also sealed the same paper, prefixing the word "security" to his name. This was held not to be the joint covenant of both, nor the joint and several covenant of each to convey a good title. That M. was the principal, and D. the surety; the title was to be conveyed by M. and not by D. who had no title.

Neither was this a joint covenant that M. should convey, nor a covenant to deliver the negro.

The covenant in this case to convey the title was the covenant of M. alone; and the covenant of D. a several one in the character of security, that M. should make the title when called on for that purpose.

APPEAL from Harford County Court. This was an action of covenant commenced on the 18th December, 1838, by the appellant against the appellees.

(a) Cited in *Jacobs vs. Davis*, 34 Md. 210; *Hanley vs. Donoghue*, 59 Md. 246. See also, *Mitchell vs. Dall*, 2 H. & G. 119; *Armstrong vs. Robinson*, 5 G. & J. 258.

The plaintiff declared, as follows—

1st Count. That whereas the said defendants, on the 26th July, 1838, at, &c., by their certain agreement, sealed, &c., covenanted to and with the said plaintiff, that they the said defendants, when thereto requested, would convey to the said plaintiff a good title to a certain negro slave called Upton, to hold the said negro to the said plaintiff as his slave for the term of ten years from the day and year aforesaid. Breach—that the defendants, though often requested, have not conveyed, &c.

2nd Count. That the said defendants by, &c., did covenant with the said plaintiff jointly and severally, on, &c., at, &c., *that they or either of them when thereto requested, would convey to said plaintiff a good and sufficient title to a certain negro boy called, &c., to hold the said negro to the said plaintiff, as his slave, for, &c. Breach—that the said defendants, although often requested, have not, nor has either of them conveyed to the said plaintiff a good, &c.

3rd Count. The said defendants, on, &c., at, &c., covenanted to and with the said plaintiff, by, &c., that the said Magraw would convey to said plaintiff a certain negro boy, &c., to serve said plaintiff as his slave, for the term of ten years, by good and sufficient title, when the said Magraw should be thereto requested. Breach—that Magraw, although often requested, hath hitherto wholly refused to deliver said negro to said plaintiff.

4th Count. That the said defendants on, &c., at, &c., by, &c., covenanted to and with the said plaintiff, that the said Magraw, when thereto requested, would convey to said plaintiff a good title to a certain negro boy named, &c., to hold the said negro boy to said plaintiff, as his slave for, &c. Breach—that Magraw hath not conveyed to said plaintiff a good title to said negro, to hold the said negro to said plaintiff, as his slave for, &c.

The covenant filed with the declaration, was as follows:—"Received, July 26th, 1838, of William Slater, the sum of two hundred dollars, in full, in payment for my negro boy Upton, to serve ten years as a slave to the said William Slater of Frederick County, State of Maryland. Witness my hand and seal, this 26th day of July, 1838. I do hereby obligate to give the said William Slater a good title for said boy when called on.

W. M. F. MAGRAW, [Seal.]

Security:

GEO. H. DUTTON, [Seal.]

The defendants demurred, generally, to the declaration, in which the plaintiff joined, and the County Court maintained the demurrer. The plaintiff appealed.

The cause was argued before BUCHANAN, C. J., STEPHEN, DOBSEY, CHAMBERS, and SPENCE, JJ.

O. Scott, for the appellant. Constable, for the appellees.

*STEPHEN, J. delivered the opinion of this Court. Upon the pleadings in this case, according to the true construction of the covenant, which furnishes the basis of the plaintiff's action, we think the judgment rendered by the Court below was correct, and ought to be affirmed. The declaration contains four counts, in neither of which does the plaintiff set out a good and sufficient cause of action, according to the sound legal interpretation of the contract upon which he has declared. The first count charges a joint covenant by the defendants, that they would convey a good legal title to the plaintiff for the negro slave called Upton; this is too clearly defective to admit of controversy, as Dutton, the security, had no title to convey, and never stipulated to any such effect. A contract by him to transfer the title, he having none to convey, would have been idle and nugatory, and therefore, was in fair, legal construction, no part of his undertaking. The second count is, that they covenanted, jointly and severally, that they, or either of them, would convey the title. This count, we think, is also defective, because it does not state the true, legal import of the covenant, upon which the suit is instituted, and was therefore fatally defective upon the demurrer of the defendant. In the covenant in this case, it is manifest, that Magraw stood to the plaintiff in the relation of principal, and Dutton in that of security; the title to the negro slave was in Magraw, and not in Dutton; the title was therefore to be made by him, and not by Dutton; to give to the contract a different construction, would be not only doing violence to the dictates of reason and common sense, but to the plain understanding of the parties. In a case where the language of a contract is equivocal and ambiguous, regard is always to be had to the subject-matter about which the parties are stipulating; and such a construction of the terms used, is to be adopted, as will carry their intention fully into effect. According to 1 *Powell on Contracts*, 380, the principle is, "that the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense; and therefore the generality of the words used, shall be restrained by the particular occasion." But in this case no doubt or ambiguity can well exist, because he expressly contracts in the character of security only. The third count is also vicious, because it states a joint covenant, that Magraw would convey the negro by a good and sufficient title; and assigns as a breach, not a failure or omission to make the title, but the non-delivery of the negro only, according to contract. It is scarcely necessary to say, that such a breach is not within the covenant, as stated by the plaintiff in his pleading. The fourth and last count is the only one, upon which the plaintiff can have the semblance of a title to recover; and that count charges a joint covenant by Dutton and Magraw, that Magraw should convey a good and sufficient title to the negro slave, which it alleges, although often requested, he has refused to

do. This count, we also think, is legally insufficient to entitle the plaintiff to recover. After acknowledging the receipt of two hundred dollars, which he says is "in full payment for my negro boy Upton," the following covenant is added, "I do hereby obligate to
270 give the said William Slater a good title * for said boy when called on;" to this covenant is subjoined the names and seals of W. M. F. Magraw and George H. Dutton, the latter adding or rather prefixing to his name the word "security." In giving a construction to this covenant, it is important to consider the relation in which the parties respectively stood to the subject-matter of the contract, and their competency to do the thing stipulated to be performed; Magraw was the owner, and alone competent to transfer the title covenanted to be made; Dutton was the security, and had in himself no title to be conveyed. The covenant to give the title was, therefore, the covenant of Magraw alone; and the covenant of Dutton a several covenant, in the character of surety, that Magraw should make the title, when called on by Slater for that purpose. This, we think, is the true import of the covenant of the parties, and viewing it in this light, it follows as a necessary consequence, that the plaintiff has failed to shew in his pleadings a good and sufficient cause of action, and that the judgment of the Court below must be affirmed. We do not think that the case of a promissory note, referred to in *Chitty on Bills*, 433, can govern the construction of this covenant. The case of a promissory note, for the payment of money, which is an evidence of indebtedness, is clearly distinguishable from a covenant, binding parties, who stand in different relations to the subject-matter of such covenant, to the performance of different and distinct duties under such covenant. The rule is well settled, that when the interest of the parties is several, and the language of the covenant is joint, the right of action founded upon it will be several. For this principle, see the *Law Compendium*, 285, and the authorities there cited, where it is said, "if the interest of the parties is several, although the words of the covenant itself be joint, yet the covenant shall be taken to be several; and where the interest is joint, the action must be joint, though the covenant, in terms, appear to be joint and several." The judgment below is affirmed.

Judgment affirmed.

271 * JOHN GLENN, Administrator of F. LINDENBERGER vs. GEORGE HEBB.—December, 1841.

Where a case was submitted by agreement, as upon bill, answer and general replication, though no general replication be in fact filed, yet it should be heard and decided according to the terms of the agreement. The answer is considered as replied to. (a)

(a) Cited in *Ware vs. Richardson*, 3 Md. 557.

When a cause is set down for hearing after the general replication is, in the facts set out in the answer as a defence, are denied. (b)

Where a partnership is stated in a bill, and confessed by the answer, the general rule is, that an account is of course, unless the party has slept upon his rights. (c)

Lapse of time may bar the right to demand an account. Qr. Must this defence be relied on in the answer to be available to the defendant?

A partnership was dissolved by the death of one partner in 1825; from 1821 to that period, the other partner had been entrusted to wind up the concern, at an annual salary, but no administration was taken out upon the deceased partner's estate until 1832, and the bill was filed in 1837.

Under such circumstances, lapse of time is not a bar to a bill filed for an account by the administrator of the deceased partner. (d)

APPEAL from the Court of Chancery. On the 5th April, 1837, the appellant filed his bill in Chancery, charging a partnership between his intestate and the appellee, the surviving partner, who took possession of the effects of the partnership, and proceeded to sell the same, collect its debts, compromise and extinguish claims against it; and that a large surplus was in his hands; that the appellee had refused to come to a fair and final settlement, or to render any account of the partnership; that he was in the possession of the books, and refused the inspection of them; and that the appellee was largely indebted to complainant. Prayer for an injunction to prevent further collection of debts; for answer to various special interrogatories; for an account of the partnership, and for further relief. Letters of administration were filed with the bill.

The defendant answered the bill, and alleged, "that it not being required by the articles of copartnership, that either of the parties should put into the concern at any particular time, any particular sum, each of the parties put into and drew out of the concern such sum or sums as suited them; that the stock account and private account of each was consolidated. * After stating a variety of advances to the deceased partner, leaving a balance due by **272** F. Lindenberger to the firm of Lindenberger & Hebb of \$10,950.18, the answer further alleged, that defendant's credits amounted to \$78,748.²¹/₁₀₀, and various sums by him put into the concern, &c., and a balance due him of \$33,453.¹⁷/₁₀₀. The answer admitted the possession of various books of account; that defendant did not know when the firm stopped payment, and that the firm had not been dissolved;

(b) Cited in *Mason vs. Martin*, 4 Md. 134. When a cause is submitted on bill and answer, without replication, the allegations in the answer are taken to be true. *Ibid*; *Hall vs. Clagett*, 48 Md. 223.

(c) But the Statute of Limitations, if relied on, is a bar to a bill for an account, as well as to an action at law, by one partner against another partner, where there have been no dealings between them for three years before filing the bill. *Wilhelm vs. Caylor*, 32 Md. 151.

(d) Cited in *Wilhelm vs. Caylor*, 32 Md. 159. Cf. *Hall vs. Clagett*, 48 Md. 223. See the second appeal in this cause in *Glenn vs. Hebb*, 17 Md. 280.

the notes of the firm were sometimes renewed; sometimes paid in country notes or goods. No list of balances or balance sheet were ever taken; that various sums were due the firm. The answer then proceeded to show in detail the mode in which many debts of the firm were settled and paid off; the insolvency of the firm, and the agreement of the deceased partner to allow him \$1,000 per annum, for winding it up. That his house, and many of his papers and books were burnt in 1833; that the winding up of the concern was considered by him as a very doubtful experiment, and if he succeeded in saving anything, it would necessarily be his, but if he failed in its accomplishment, he would lose several years of the prime of his life for no good purpose; that his former partner had drawn more out of the concern than he put into it; this deficiency was made up by the capital of defendant, and by profit and loss, made on the sale and disposition of his goods, and that it had been decided by a competent tribunal, that he had no funds of the said F. L. in his hands. With this answer various schedules and accounts were also filed, showing defendant's course in winding up the partnership.

In this stage of the cause, "it was agreed, that the Chancellor shall at this time consider and decide upon the right of the complainant to an account upon the bill, answer and general replication."

The cause being submitted to the Chancellor, he dismissed the bill, and the complainant appealed.

This cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

273 * *R. Johnson*, for the appellant.
 J. Johnson and *A. C. Magruder*, for the appellee.

ARCHER, J. delivered the opinion of the Court. This was a bill filed by Glenn, administrator of Lindenberger, one of the firm of Lindenberger & Hebb, against Hebb, the surviving partner, to obtain an account and settlement of the partnership transactions. Hebb filed his answer admitting the existence of the partnership, and that it continued, until dissolved by the death of Lindenberger in 1825; that in 1821, the firm being embarrassed and involved in difficulties, Hebb undertook the settlement of the partnership concerns for a sum of one thousand dollars, to be annually allowed him for his services in this respect, and became the purchaser of the goods on hand in 1821, to be paid for, one-fifth in ten months, and the balance in two, three, four, and five years; that he proceeded to the discharge of his duties in closing the accounts of the concern, and he avers that upon such settlement, the concern is largely indebted to him. He further avers, that some of the books and papers of the concern were burned by accident in the year 1833. It appears that the complainant administered on the estate of Lindenberger in the month of June, in the year 1832, and filed this his bill on 5th April, 1837. By

agreement of the parties, the case was submitted to the Chancellor, on bill, answer, and general replication, to determine whether there should be a decree to account. No replication was in fact filed.

We must, as we apprehend, however, consider the case as if a replication had in fact been filed, for the agreement indicates that the case was to be heard by the Chancellor upon bill, answer and replication. Such was the clear understanding of the parties, and we cannot, without injustice, consider the answer as not replied to.

In this view of the agreement, the cause is set down for hearing, and the facts set out in the answer as a defence, are denied.

The partnership is stated in the bill, and is confessed by the answer, and in such case the general rule is, that an account **274** is of course, unless the party has slept upon his rights.

It is objected, that this case furnishes an exception to the general rule, and that lapse of time bars an account. We shall not examine the question, whether this defence should have been relied upon in the answer, to be available, because we do not believe that such a defence would be legitimately made under the circumstances of this case. It is true, the partnership existed in this case for a long period, but it never was dissolved, till the death of the complainant's intestate operated a dissolution, and this event never occurred until December, 1825, and from 1821 to the period of Frederick Lindenberg's death, the defendant Hebb, who was himself one of the partners, was entrusted to wind up and settle the concern, at an annual salary. No administration existed on Lindenberg's estate until 1832, and it could not be doubted, but that the administrator of Lindenberg, when his rights accrued, had a perfect right to call upon the surviving partner for an account. The delay of the administrator for nearly five years, to file his bill, is not in our judgment such a delay as would enable the respondent to rely on the lapse of time, and to treat the claim as a stale claim; and therefore, not entitled to the countenance of a Court of equity.

We are, therefore, of opinion, that the case should have been sent to the auditor; that an account should be taken of the copartner-ship transactions.

From the above views, it will follow, that the decree of the Chancellor, dismissing the complainant's bill, should be reversed, and that the cause should be remanded to the Chancellor for further proceedings.

Decree reversed, and cause remanded.

275 * THOMAS H. CLAGETT, Administrator of J. H. BEANES
vs. DAVID CRAWFORD, Trustee of MELICENT MAGRUDER.—December, 1841.

Since the Act of 1830, chap. 185, an order of the Court of Chancery, which is not a final decree, nor in the nature of a final decree, does not authorize an appeal. (a)

A preparatory order directing the auditor to state an account, with a view to a future decree, and containing various opinions and directions according to the then existing views of the Chancellor, for the guidance of the auditor, is not an adjudication of any right between parties. (b)

Under such an order, although the auditor may report in strict compliance with the Chancellor's expressed views, still he may overrule the account, order another upon different principles, or even dismiss the proceedings if justice requires it. (c)

Where a testator appoints a trustee, and directs a sale of his real and personal estate by him, the proceeds constitutes an aggregate of personal estate, which can only pass as such. Legacies for life, with remainder over in such cases, only entitle the tenant for life to annual interest on dividends. *Per* BLAND, Chancellor.

The petitions of various legatees under such a will, in the same Court, being in relation to the same subject-matter, must be treated as one entire and blended course of judicial proceedings, to which such legatees are all considered as parties. *Per* BLAND, C.

Where some of the co-legatees in such a case were sureties for the trustee, who sold the land and wasted the funds, and the nature and extent of their liability as sureties appeared on the record, they can receive nothing until the other co-legatees are paid in full their portions of the misapplied funds. *Per* BLAND, C.

Although it is true as a general rule, that where money is directed to be invested on good security, it cannot be put out on mere personal security of any kind, yet where a testator has recognized the propriety of making an investment in stocks, bonds or other securities, any such securities as have been received by the trustee under his will, may be considered as a proper investment, unless it should appear they had been since lost by his misconduct or negligence. *Per* BLAND, C.

In such case, the trustee would be held accountable as for so much money, for all mere simple contract evidences of debt below the grade of specialty securities, received by him. *Per* BLAND, C.

APPEAL from the Court of Chancery. On the 2nd July, 1833, James A. Magruder and wife filed their petition on the equity side

(a) See Rev. Code, Art. 71, secs. 41, 42; *Snowden vs. Dorsey*, 6 H. & J. 94, note.

(b) Affirmed in *Owings vs. Worthington*, 4 Md. 261; *Wilhelm vs. Caylor*, 32 Md. 162; *Barton vs. Higgins*, 41 Md. 546; *Meyer vs. Stewart*, 48 Md. 425; *Nally vs. Long*, 56 Md. 571. See also, *Hagthorp vs. Hook*, 1 G. & J. 129, note (a).

(c) Approved in *Peyton vs. Ayres*, 2 Md. Ch. 69.

of Prince George's County Court, praying for the appointment of a trustee, to sell real * estate under the will of William Beanes, deceased, exhibiting with it the will of said Beanes. The **276** trustees appointed by the will were dead. Another trustee was appointed, who gave bond, and reported several sales, which were ratified. The case was then referred to the auditor, who reported accounts, and distributed the balance to John H. Beanes and Melicent Magruder in moieties. This account was confirmed on the 14th November, 1835. On the 11th July, 1837, David Crawford, as trustee of Melicent Magruder, filed his petition, suggesting that she was entitled to certain sums under the said will, and requiring the trustee, John B. Brooke, through whose hands they were to pass, not to pay them over, except to the petitioner. This petition was demurred to, the demurrer overruled, and the trustee in the cause ordered to retain in his hands the amount allowed to J. H. Beanes, out of the proceeds of the property decreed to be sold until the further order of the Court. The petition was then answered by the appellant, and the cause removed from Prince George's County Court to the Court of Chancery, where, after various proceedings, that Court (BLAND, Chancellor,) passed the following order:

Ordered, that this cause be and the same is hereby referred to the auditor, with directions to state an account from the proceedings and proofs now in the case, and from such other proofs as may be laid before him, shewing how much, if any, of principal or interest yet remains unsatisfied or uninvested, of the legacies due to Melicent Magruder and others, under the will of William Beanes, deceased. The auditor will observe, that the proceeds of the sale directed to be made by the testator of certain portions of his real and personal estate, constitutes an aggregate amount of personal estate, which can only pass as such; and that, so considered, the bequest to Philip Key passes only a life estate to him; and thence, on the happening of the specified contingency, a similar estate to Melicent Magruder, remainder to her children absolutely; and consequently those tenants for life could take no more than the annual interest or dividends of the specified legacy. The Chancellor conceives that his opinion accords with that which * must have been the opinion **277** of the County Court, as indicated by the decree of the 2d July, 1833, and the order of the 11th July, 1837, confirming the auditor's report. Taking this view of these bequests, it follows, that the petition of Philip Key, filed on the 2d of April, 1831; and the petition of James A. Magruder and wife, filed on the 2d of April, 1833, with that of David Crawford, as trustee of Melicent Magruder, filed on the 10th of July, 1837, together with the proceeding under each of them, must necessarily be treated as one entire and blended course of judicial proceedings in the same Court, in relation to the same subject, to which all who claim any portion of the sum so directed by the testator to be raised by the sale of portions of his real and

personal estate, must be considered as having been, and now being parties. From all which it clearly follows, that no one of such parties can have awarded to him any thing, until he has made good all that, the safety of which he had become bound to assure to his co-distributees or co-legatees, so that neither Philip Key, Colmore Beanes, nor John H. Beanes, or either of their representatives, can be allowed to receive any thing, either principal or interest, until Melicent Magruder has obtained a full satisfaction of her share, or so much thereof as has been in any way lost by the misconduct of James A. Magruder, who, as trustee, must be regarded as an officer of the Court, for whom Philip Key, Colmore Beanes and John H. Beanes, were sureties in his trustee's bond. For although an action at law might have been sustained against them on their bond, yet as it forms a part of these proceedings, and the nature and extent of their liability to Melicent Magruder has been thus placed upon the record, they cannot be allowed here to clear themselves from it, to her prejudice, or to the prejudice of those who may claim after her. The auditor will further observe, that although it is true as a general rule, that where money is directed to be invested on good security, it cannot be put out on mere personal security of any kind, yet here, as the testator has recognized the propriety of making an investment in stocks, bonds, or other securities, any such securities which had been received by the trustee, James * A. Magruder, **278** may be considered as a proper investment, for which he may be allowed, unless it should appear, that they had been since lost by his misconduct or negligence; but that he is to be held accountable, as for so much money, for all mere simple contract evidences of debt, below the grade of specialty securities, which have been received by him; the order of the 10th of April, 1838, as connected with the subsequent proceedings in relation to this matter, not appearing to have been a final allowance to him of any such simple contract evidences of debt as an investment.

The parties are hereby authorized to take testimony in relation to the said account, before any justice of the peace, on giving three days notice as usual; provided, that the said testimony be taken and filed in this case in the Chancery office, on or before the first day of January next.

The administrator of John H. Beanes, one of the legatees, appealed to this Court, where the appellee moved to dismiss the same. The motion to dismiss was argued before—

BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

J. Johnson, for the motion, maintained, that the order appealed from, was interlocutory merely; did not finally decide any right, and hence the appeal was premature.

Tuck and C. C. Magruder, contra. A fund was already in Court, to which the appellant was entitled by the auditor's account, ratified by the Court. The appellee filed his petition, claiming that a certain demand should be satisfied out of the appellant's interest in that fund. The Chancellor passed an order for an account, in which he directs that the auditor shall assume certain principles, as established and settled, and by which the appellee was admitted to participate in the appellant's ascertained interest in the fund. The case presented two questions—1st. Whether the appellee was entitled to any portion of the fund? 2d. To what amount he was entitled? The appellant denied his claim to any part of it; and the Chancellor, in directing an account, of course determines this first question against the appellant.

The real question now before the Court is, whether the order of the Chancellor does so affect the appellant's right as to give him an immediate right of appeal. They cited *Thompson vs. McKim*, 6 H. & J. 328; *Williamson vs. Carnan*, 6 G. & J. 215; *Danels vs. Tagart*, 1 G. & J. 321.

This is not a case of mutual dealing, where something may or may not be done, and an account is indispensable to the final decree. We say the appellee has no claim. The Chancellor, in directing an account, has decided that he has a fair * claim; that the question of right is against the appellant. If upon the whole case, **281** this Court should determine that the appellee has no claim, the whole controversy will be ended, and the appellant will be entitled to the use of his money, otherwise it will remain tied up in Court until the record can be sent back; the account stated, and brought here again, because the Chancellor has already decided the case against the appellant. In this case the appellant alone is interested, because the appellee will be paid, if at all, his whole demand—principal and interest—so long as the fund in Court continues to be large enough for this purpose. In the productiveness of the fund, the appellee alone is concerned, and the order is therefore irreparable in its character to him alone, and not equal or mutual in its injurious consequences. The appellee's claim is bearing interest, the appellant's money in Court is not.

The Court should have dismissed the petition, and not put the fund (that is the appellant,) to the cost of the accounts. They were not necessary to a decree in his favor. The claim of appellee's depends on the construction of William Beanes' will. It is obvious, then, that any direction involving the construction of that instrument, is a decision of the whole controversy between the parties, and the same in character with *Thompson vs. McKim*.

In all the cases referred to by the appellee's counsel, the directions of the Chancellor were prefatory to the order, which is the judicial act. Here they form parts of the order itself. Every sentence of the order is—not an opinion—but a decision of the questions involved,

and "bears the impress of the Chancellor's judicial opinion upon the merits of the case."

The Chancellor should have passed a final decree in favor of the appellant. There was no necessity for an account to this end. No interlocutory proceeding was necessary, and in fact this order is decisive of the right involved, and is to that extent final. An order is interlocutory, where it happens that some material circumstance or fact necessary to be made known, is either not stated, or so imperfectly ascertained, that the Court, by reason of that defect, cannot determine finally between * the parties, and a reference is necessary to have the doubts occasioned by that defect removed. See *Maryland Ch. Prac.* 122. Here there was no fact required to be more fully ascertained, to enable the Court to determine finally between the parties. Upon the whole case as it then appeared, he should have decreed in favor of the appellant. It was ready for a final decree, because all the circumstances and facts material and necessary to a complete explanation of the matters in controversy, were brought before the Court, and so fully ascertained by the pleadings and proofs that the Chancellor could have collected the respective merits of the parties, and determined fully and finally that the appellee was not entitled to relief.

This is an order in the nature of a final decree, in the contemplation of chap. 185, of 1830. It decides the rights of the parties. It concludes the mind of the Chancellor upon all the points on which he has expressed himself, and leaves him nothing to do but to ratify what the auditor may report in pursuance of the order.

The Chancellor has given a construction to the will of Beanes, by which the appellee is entitled to this fund; that the whole proceedings must be considered as one entire suit about the same subject-matter; that the appellee need not look alone to his suit at law or the bond, &c. &c. (See his order.) And as stated in *Thompson vs. McKim*, 329, "he has passed an order upon the issue in the cause relative to the subject-matter in dispute, and involves a decision of the question of right between the parties." It aggrieves the party, and is the subject of appeal.

The answer of the appellant also maintains the position, that the petitioner cannot recover in this proceeding, because he was not properly a party thereto; that the petition was not sworn to, and was in other respects informal, and these questions were certainly included in the Chancellor's order, and if so, the appellant did properly take an appeal. *Wolf vs. Wolf*, 2 H. & G. 383.

285 * ARCHER, J. delivered the opinion of the Court. The order of the Chancellor of 16th November, 1840, appealed from in this case, is not a final decree, or in the nature of a final decree, so as to authorize an appeal since the Act of 1830, chap. 185. The order does not adjudicate any right between the parties. It is pre-

paratory only, and directs the auditor to state an account, with a view to a future decree, and that such account should be stated, in conformity with the then existing views of the Chancellor, various opinions are expressed in the order and suggested to the auditor. But nothing has been done by the Chancellor which settles any right, or from which he might not have departed in any future stage of the cause, although the auditor may have reported in strict compliance with the Chancellor's views as indicated by the order; still it was in the Chancellor's power to overrule the account, and to have ordered another account to have been stated upon different principles or even to have dismissed the petition, if in his judgment justice required it. The appeal is accordingly dismissed.

Appeal dismissed.

JONATHAN PROUT *et al.* vs. ZACHARIAH BERRY and Wife. (a)
December Term, 1841.

Under the Act of 1826, ch. 200, sec. 6, upon an appeal from the Court of Chancery, the record must be transmitted to this Court within forty days from the entry of the appeal, otherwise the appeal will be dismissed on motion. (b)

The clerk of the Court is not authorized to strike out a judgment and reinstate a cause, except by order of the Court, although he may be so directed by Act of Legislature. (c)

* See the Acts of Assembly at the end of this case in relation to appeals. **286**

APPEAL from the Court of Chancery. At this term, *Pratt, Alexander*, and *Bowie*, moved to dismiss this appeal, upon this ground, that the record was not transmitted within the period required by the Act of 1826, ch. 200, sec. 6.

The motion was resisted by *Tuck* and *Randall*, for the appellants.

BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ. heard the motion.

ARCHER, J. delivered the opinion of the Court. A decree of the Court of Chancery, dated 3rd November, 1838, and an order of same Court, made on the 25th January, 1839, were appealed from in that Court on the 26th January, 1839. The record never was transmitted to this Court until the 20th February, 1840. The motion to dismiss the appeal, entered in this case, must be governed by the decision of

(a) See the second appeal in this case in *Prout vs. Berry*, 2 Gill, 147.

(b) See Rule 27 of the Court of Appeals.

(c) Cited in *Dorsey vs. Dorsey*, 37 Md. 78.

this Court in the case of *Chayter and others vs. Oliver's Executors*, December Term, 1839.

The record should have been transmitted to this Court within forty days from the entry of the appeal. *Appeal dismissed.*

At June Term, 1843, the appellants moved the Court to reinstate this appeal, and produced to the Court the Act of 1842, ch. 168, passed on the 25th February, 1843.

The first section of which enacted, "That the Clerk of the Court of Appeals for the Western Shore, be and he is hereby authorized and directed, from and after the day of the passage of this Act, to reinstate and place this cause on the docket of said Court."

The 2nd section, directed the clerk to bring forward this cause upon the docket by regular continuance, so as to be placed on the trial docket of June, 1843, to be heard and * determined by
287 the said Court of Appeals, as if the said transcript had been transmitted to and filed in said Court within the time required by law.

The 3rd section declared, That nothing herein shall authorize the Court of Appeals to review, reverse or correct the orders of the Chancellor, appealed from as aforesaid, in favor of any of the parties to the writ, excepting the appellants, as aforesaid; and if, on the hearing of the said appeal, the said orders shall be reversed, and it shall be determined that the said appellees, Z. Berry and wife, were not entitled to a share of the fund distributed by the said orders, then in such case, the said appellees shall be entitled to retain out of the moneys which they may be required to pay the appellants, in consequence of such reversal, such proportions of the sums of money which they may have paid to the annuitants under the last will and testament of Levi Gantt, deceased, as the Court may deem just and equitable, and the said appellants shall be substituted in the place of the said appellees, as against the annuitants, to the extent of such retainer.

This motion was made to the Court, in consequence of the clerk of the Court declining to reinstate the cause without the order of the Court to that effect, and was resisted by the appellees.

BY THE COURT—

Motion overruled.

By the Act of 1841, ch. 46, on any appeal being entered in the County Court, or in the Chancery Court, or County Court as a Court of equity, or upon production of a writ of error, it is the duty of the clerk or register of such Court to transmit to the Court of Appeals a full transcript of the record within nine months after the appeal taken or writ of error produced; and upon receipt of such transcript by the clerk of the Court of Appeals, he shall enter the case upon the docket, as of the term next after the date of the

appeal, or of the writ of error in such case. If filed as aforesaid, not to be dismissed by the Court of Appeals.

1842, ch. 28. Upon appeals from the decrees of the Orphans' Court, the record to be transmitted within sixty days * after the appeal, or to the next Court of Appeals (as the case may be,) after the appeal is entered, and not to be dismissed if this Act is complied with. **288**

1842, ch. 288. Appeals to be entertained, although the record shall not have been transmitted within the time required by law, if it shall appear to the Court of Appeals, that the delay of transmission, was by the neglect or omission of the register or clerk, and without default of the party.

1843, ch. 41. The dismissal of any appeal, because of the failure of the clerk or register below in sending up a transcript of the record, within the time required by law, not a bar to any subsequent appeal, provided it be taken within the time limited by law for appealing from such judgment or decree.

1843, ch. 73. Appeals under Act of 1832, ch. 197, from refusals to grant or continue injunctions, will lie without a previous order from one of the Judges of the Appellate Court.

JUNE TERM, 1842.

STEPHEN L. LEE *vs.* THOMAS N. PINDLE and EMELINE his Wife and others.—June Term, 1842.

After an appeal taken from an order of the Court of Chancery, and dismissed by this Court, the cause was again brought to the notice of the Chancellor by petition for further proceedings; it is then in the same situation as if no appeal had been taken.

The principle is settled, that Chancery will not, on further directions, decide a question, not reserved by the original decree.

But in a decree for the sale of negroes, to warrant the Court in granting full and complete relief for their hire and annual value, as prayed by the bill, it is not necessary to reserve any equity for further directions as to those subjects.

Neither does this general rule prevent the Court from giving interest on further directions, though the question of interest was not reserved by the decree.

Where it is necessary to determine the value of the hire of negroes, by an average of opinions, the estimates of those who did not know the negroes, ought not to be mixed up with, and allowed equal weight and influence with the valuations of those who did know them, and who testified from such their personal knowledge.

* In making such estimates, proper allowances ought also to be made for the expense of maintaining and clothing the whole, as well as those incapable of labor, as those able to work; and the hire of those **289**

killed by accident, ought not to be carried further than the day of the death.

Interest may be charged on the annual hire of negroes or value of their services, where it constitutes a debt, from the time it becomes due and payable.

A will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable; but if there be any conflict or repugancy between them, the codicil, as the last indication of the testator's mind, must operate in preference to the will. (a)

The testator having by his will declared as follows: "*Item*.—Considering the term of six years after my decease, ample and sufficient time out of the profits of my estate bequeathed to my wife Elizabeth Lee," (to whom he had previously bequeathed for life the chief part of his slaves,) "to provide for the payment and discharge of all my just debts, and to pay off the legacies hereinbefore bequeathed;" afterwards, by a codicil, revoked "the bequest of any of my slaves as made in my will, but will and direct, that the whole of my slaves remain in the possession of my wife during her life, for the benefit of her and my children, in common, in working and cultivating the lands and premises whereon I now reside, for the purpose as heretofore set forth in my will; and after her decease, the same shall be equally divided among my children, that is to say," naming them: *Held*, that by the codicil the slaves were given to the widow for life, and at her death to the children named therein, and that the pecuniary legatees under the will, and the personal representatives of the widow could not be affected by the decree in this cause, and were not therefore necessary parties. From the death of the widow, the hire and profits of the negroes ceased to be a fund for the payment of legacies.

Neither were the legatees of the slaves, under the codicil, obliged to await the expiration of the six years before they could claim the negroes and their hires. Their rights attached immediately upon the death of the widow.

Costs in Chancery are in the discretion of the Court.

Where an executor interposes no improper obstacles to the ascertainment of the right to property, found in the possession of his testator, the costs are properly chargeable on the fund; but if, in the progress of a cause, he changes his conduct, and offers untenable and vexatious grounds of defence, equity may award costs against him upon the final decree.

Under the bill in this cause, the distributive share of each legatee should have been liquidated and finally settled by the decree, so as to prevent all future controversy and litigation upon the subject; and it was error to stop the account for hires and profits at a period anterior to the sale, reserving directions for a further account from such period to the day of sale, when that should in fact take place.

APPEAL from the Court of Chancery. The bill in this cause was filed on the 2nd December, 1837, * by T. N. Pindle and wife, praying
290 subpœna against the executors of Stephen Lee, Elizabeth Ann

(a) Approved in *Johns Hopkins University vs. Pinckney*, 55 Md. 381; *Boyle vs. Parker*, 3 Md. Ch. 45. Where the devise in the will is clear, the intention to revoke by the codicil must be equally clear. *Ibid*.

Lee, the appellant, and others. The object of the bill was to procure a distribution of certain slaves, devised by Stephen Lee to his wife for life, remainder to certain of his children, possessed by the appellant at the death of his mother, and for an account of profits and increase.

With the bill, the will of Stephen Lee was filed, which is as follows:

I, Stephen Lee, of, &c., do make and constitute this my last will:

Item.—I give and bequeath to my affectionate wife, Elizabeth Lee, the whole of my estate, real and personal, of every description, to be held by her for the benefit and maintenance and support of my family, under age, at the time of my decease, during her life or widowhood, but that no part thereof shall be subject or liable to the payment of any debts to be contracted by her; but at her demise, or in the event of her marriage, I then give and bequeath as follows, to wit:

Item.—I give and bequeath to my son, Stephen Lewis Lee, the plantation on which I now reside, to him and his heirs, in fee simple, provided, &c.

Item.—I give and bequeath unto my said son, Thomas Daniel Lee, my two tracts of land on, &c.

Item.—I give and bequeath to my said son, Stephen Lewis Lee, one negro man, to be selected by him, &c., giving to him the right of first choice.

Item.—I give and bequeath to my son, Thomas Daniel Lee, one negro man, to be selected by him, having the right of second choice.

Item.—I give and bequeath to my son, Stephen Lewis Lee, my large fowling piece, and the second choice of my two small guns, one feather bed, bedstead and furniture, and my black horse.

Item.—I give and bequeath to my son, Thomas Daniel Lee, my two muskets, and the choice of my two small guns, and one feather bed, bedstead and furniture.

* Item.—It is my will and desire, that each of my daughters reside with their mother, during their single lives, to be supported, at her discretion, out of the proceeds of the whole estate bequeathed to my wife, as before mentioned, and that the same be considered as given to her for that purpose. **291**

Item.—I give and bequeath unto my daughter, Susan Bird, and two sons, John Lee and Edward Lee, and to each of them, five hundred dollars, to be paid to them and each of them, their heirs or assigns, at the expiration of six years after my decease, without interest; but should the said legacies not be punctually paid at the expiration of six years, as above mentioned, then, and in that case, the same shall bear legal interest until paid.

Item.—I give and bequeath to my daughters, Elizabeth Lee, Louisa Mackall Lee, Emeline Priscilla Lee, Rachel Maria Lee and Margaret Johns Linthicum, the whole of my household furniture, not herein-

before bequeathed, to be equally divided between them, share and share alike.

Item.—The balance of my property, not hereinbefore bequeathed, of whatever nature or kind the same may consist, I give and bequeath to my daughters, Margaret Johns Linthicum, Elizabeth Ann Lee, Louisa Mackall Lee, Emeline Priscilla Lee and Rachel Maria Lee, to be equally divided between them.

Item.—In case Stephen Lewis Lee or Thomas Daniel Lee, or either of them, should die without lawful issue, it is my will, that the property hereinbefore bequeathed to them in this my will, shall go to my daughters, hereinbefore mentioned, share and alike.

Item.—I give and bequeath to my son, Benjamin Lee, two hundred and fifty dollars, to be paid to him on the same terms, as before mentioned, of the legacies of five hundred dollars each, to Susan Bird, John Lee and Edward Lee.

Item.—Considering the term of six years after my decease ample and sufficient time to provide, out of the profits of my estate, bequeathed to my wife, Elizabeth Lee to provide for the payment, and discharge of all my just debts, and pay off the legacies hereinbefore

292 bequeathed, it is my will and desire, * that should my wife die before the expiration of the term limited, and the debts and legacies shall not have been paid and discharged, then, and in that case, the property so bequeathed to my said wife as aforesaid, shall be the right and estate of my son Stephen Lewis Lee, on the same terms and for the same purposes for which it is bequeathed to my wife, Elizabeth Lee, as aforesaid, and at the expiration of which term, I will and direct, that the division and distribution of my estate, as hereinbefore bequeathed, shall take place agreeably to this my will. In testimony whereof, I have hereunto set, &c.; this 16th June, 1827,

The first codicil is not material to the cause, and is therefore omitted.

Second Codicil.—Whereas I, Stephen Lee, of, &c., having made and duly executed my last will and testament, bearing date the sixteenth day of June, in the year of our Lord one thousand eight hundred and twenty-seven, and every clause and bequest therein contained, I do hereby ratify and confirm, except so far as is altered by this my codicil:

Item.—Whereas since the making and executing my last will and testament, I have acquired, by purchase, a plantation, in South River Neck, called Hasling, or by whatsoever name the same may be called, containing about one hundred and thirty-nine and three-quarter acres of land, more or less. I give and bequeath the same to my son, Thomas Daniel Lee, his heirs or assigns, in fee simple, upon the same terms, and under the same restrictions as the bequests made to him in my will; and I do hereby revoke the bequest made to my son, Thomas Daniel Lee, in my will, so far as relates to the lands and premises therein mentioned and bequeathed to him:

the estate in South River Neck, being given to him in lieu of my bequest made to him of any part of my landed estate, as mentioned in my said will; and it is my will and desire, that in case my said son, Thomas Daniel Lee, should die without lawful issue, or before his arrival at lawful age, the lands and premises herein bequeathed to him, shall go and be divided between my other children, as before provided for in my said will.

* Item.—It is my will, and I do hereby desire, that all my just debts shall be provided for and discharged, as soon as circumstances will permit, at the discretion of my executors herein-after named. **293**

Item.—I will and direct, that in addition to what I have already given to my daughter Susan Bird, in my will, that she shall have and receive one hundred and fifty dollars, current money, to be provided for and paid to her as before directed.

Item.—I further will and direct, that in addition to what I have already given to my son John Lee, in my will, that he shall have and receive one hundred and fifty dollars, current money, to be provided for and paid to him as before directed.

Item.—I further will and direct, that in addition to what I have already given to my son Edward Lee, in my will, that he shall have and receive one hundred and fifty dollars, current money, to be provided for and paid to him as before directed.

Item.—I do hereby revoke the bequest of any of my slaves, as made in my will, but will and direct that the whole of my slaves shall remain in the possession of my wife, during her life, for the benefit of her and my children, in common, in working and cultivating the lands and premises whereon I now reside, for the purposes, as heretofore set forth in my will, and after her decease, the same shall be equally divided among my children, that is to say, Elizabeth Ann Lee, Louisa Mackall Lee, Emeline Priscilla Lee, Margaret Johns Linthicum, Stephen Lewis Lee and Thomas Daniel Lee, to them and their heirs.

Item.—And lastly, I do hereby constitute and appoint Stephen Lewis Lee, and my friend and relation, Robert Welch of Ben., to be sole executors of this my last will and codicil, revoking and annulling all former wills and codicils, confirm—this and none other to be my last will and codicil.

Item.—It is my will and desire, and I do hereby so will and direct, that my son Stephen Lewis Lee, shall not have or receive any commission, as one of the executors of this my last will and codicil, having made provision for him for what he shall receive of my estate.

* In testimony whereof, I have hereunto set, &c., this 5th December, 1832. **294**

After various answers filed, the defendants, Stephen L. Lee and Robert Welch of Ben., executors of Stephen Lee and Stephen L.

Lee, objected to the sufficiency of the allegations in the complainant's bill, and to the relief thereby sought, and assigned the following reasons :

1st. Because Susan Bird, John Lee, Benjamin Lee, Edward Lee and Margaret Johns Linthicum, executrix of Elizabeth Lee, deceased, legatees of the testator, are material and necessary parties to a full and final adjustment of the matters set forth in the bill, and have been omitted to be parties thereto.

2nd. Because all the estate of the testator, real and personal, hath been disposed of by his last will and codicil, and there are many legacies specifically bequeathed, and it is obvious, that the whole cannot be paid over to legatees, and there must be abatement and contribution among them, and yet there are no such averments in the bill or parties made thereto as will enable the Court to adjust fully and finally these conflicting claims.

3rd. Because it is not alleged in the bill, that the executors of Stephen Lee, deceased, assented to the legacy claimed by the bill and there is a denial thereof in the answer of executors.

4th. Because the bill does not state, that the legatees, entitled to pecuniary legacies under the will and codicil, have been paid off.

5th. Because the pecuniary legacies are a charge upon the real and personal estates.

6th. Because there are no facts stated in the bill to give jurisdiction to this Court—the complainants, if entitled to anything, are entitled to remedy therefor in a Court of law.

At the same time, there was filed in the cause an agreement in the words following :

"It is admitted that the personal assets of Stephen Lee, the testator, exclusive of the negroes, now remaining in the hands of Stephen Lewis Lee, one of the executors, are sufficient to pay the debts of the testator, but it is not admitted * that these assets
295 are sufficient to pay the pecuniary legacies also.

"It is further admitted, that of the negroes returned in the inventory, the following are now dead, that is to say, Philip, Abraham, Mary and William, the son of Judy ; Philip, William and Mary died in the life-time of the widow, but Abraham was drowned since the property came to the possession of Stephen Lewis Lee, that is to say, on the 3rd of June, 1838.

"It is further admitted, that Philip, the child of Judy, was born in the year 1834, during the life of the widow."

The general replication to the answers of the defendants was then filed, and at the same term the Chancellor passed an order in said cause in the words following :

Ordered, that this case be, and the same is, hereby referred to the auditor, with directions to make a statement from the pleadings and proofs now in the case, and from such other proofs as may be laid before him, of the present value of all and each one of the slaves of

the said testator, together with their increase from the time of the death of the said testator, to the day of making the said statement, and then, if practicable, to make an equal division of the said slaves and their increase, among the said legatees, Elizabeth Ann Lee, Louisa Mackall Cole, Emeline Priscilla Pindle, Margaret Johns Linthicum, Stephen Lewis Lee, and Thomas Daniel Lee; but if an equal division of the said slaves cannot be made without a sale, then to state the same accordingly to the end, that the Court may be enabled to order a delivery of the said slaves or the payment of the proceeds of the sale of them in due proportions to the said legatees. And it is further ordered, that the defendant, Stephen Lewis Lee, account for the hire and profits of the said slaves, and their increase, after the death of the testator, to the said legatees, from the death of the said widow of the said testator, until the same shall have been delivered up or sold; and the auditor is directed to state an account accordingly of such hires, profits and increase, from the pleadings and proofs now in the case, and from such other proofs *as may be laid before him, and the parties are hereby authorized to take testimony in relation to the said statement, 296 division and account, before any justice of the peace, on giving three days' notice as usual, provided, that the said testimony be taken and filed in the Chancery office on or before the twenty-fifth day of September next.

While the cause was pending before the auditor, testimony was taken under the interlocutory order, which is sufficiently stated in the opinion of this Court.

On the 21st January, 1839, the auditor reported to the Honorable the Chancellor, that he had examined the proceedings in this cause, and in execution of the order of the 1st August, 1838, stated four accounts of the hire of the negroes of Stephen Lee's estate, from the time of the death of Mrs. Elizabeth Lee, the tenant for life, to this day, herewith submitted, A, B, C and D.

Account A, is stated according to the average testimony of the complainants' witnesses.

Account B, according to the average of the defendant's witnesses.

Account C, according to the average of all the witnesses.

On each of these three accounts hire is included for all the negroes to this day, and interest has been charged in the usual manner.

Account D, is stated according to the instructions of the solicitors of the defendants, without interest.

The auditor further reports, that all the witnesses examined on that subject testify, that the said negroes, and their increase, cannot be equally divided among the six legatees thereof without a sale, and that he has not assigned to the several legatees their respective shares, awaiting the Chancellor's final order therefor.

The defendant, Stephen L. Lee, excepted to the auditor's report and accounts filed January, 1839, marked A, B and C, for the following causes:

1st. Because the witnesses on whose testimony said accounts are founded, do not know the said negroes or the value of their
297 * hire, and do profess to have no such knowledge in their depositions.

2d. Because the said witnesses, in their depositions, omit to state what allowances should be made the defendant for the clothing, medical attendance, and other expenses of said negroes who could work ; and also, what for the support of the old and young negroes that could not work.

3d. Because the said witnesses include in their estimates of hire, negro man Abraham who was drowned, as is proved without any neglect of said Lee, during the time for which hire is allowed for him, for which, of course, no service was received by the said Lee.

4th. Because interest is charged on the whole amount of the said estimated hire, whereas a majority, if not all the legatees agreed, that by the will and intention of the testator, said Stephen L. Lee was entitled to the said hires.

5th. Because in accounts A and C, the auditor has assumed that the average value of the negroes, according to the testimony of William H. Journey, is \$200 ; whereas, it is evident, that the said value was intended to be reduced by an estimate of the expense of maintaining young and infirm negroes, as shewn in account D.

The complainants also excepted to the auditor's report and accounts filed on the 21st of January, 1839, marked B, C, and D, for the following causes :

1st. Because in account B, the estimate of the witnesses, Joseph Carr and John Tydings, is reduced ten dollars each for the cost of supporting two infant children, when it is evident the said witnesses, in speaking of the net annual value of the negroes, made an allowance for such expense.

2d. Because in account C, the estimates of the same witnesses are subjected to similar reductions, and because the two accounts B and C differ from account A, and they insist upon those differences, each and all of them, as grounds of exception, and that the account A should be confirmed.

3d. To account D the complainants except, because it is founded
298 upon the estimate of a single witness, and because * even that estimate is reduced by an allowance for the support of the old woman, girl and boy, for which there is no foundation, and because it contains no charge for interest on the hire of the negroes, which the complainants insist is erroneous.

On the 16th day of March, 1839, the cause being submitted by consent, the Chancellor passed the following decree :

This case standing ready, &c., and it appearing by the auditor's report of the 21st January, 1839, made in pursuance of the order of the first day of August last, that the negro slaves in the proceedings mentioned and their increase, are not susceptible of division among

the parties entitled without a sale thereof, and the said report to that extent not being excepted to by any of the parties, it is thereupon, this 16th March, 1839, by THEODORICK BLAND, Chancellor, by, &c., adjudged, &c., that the said report of the auditor, so far as the same assumes that the said slaves and their increase cannot be divided among the parties without a sale, be and the same is hereby ratified and confirmed.

And it is further adjudged, ordered and decreed, by the authority aforesaid, that the said slaves and their increase be sold; that Alexander Randall and John Johnson, of the City of Annapolis, be and they are hereby appointed trustees to make such sale, &c., and that the course and manner of their proceedings shall be as follows, &c.

From which decree the defendant, Stephen L. Lee, afterwards, on the twenty-seventh day of March, eighteen hundred and thirty-nine, prayed an appeal.

The said appeal was granted, and the proceedings were accordingly transmitted.

On the 29th day of March, 1841, complainants filed their petition in Chancery, representing briefly, the history and progress of the cause, and that an appeal was prosecuted by the said Stephen L. Lee, one of the defendants from said decree, to the Court of Appeals for the Western Shore of Maryland, which Court, at December Term eighteen hundred and forty, dismissed the said appeal, upon the ground, as your petitioner is advised, that no decree had been passed by your * honor, ascertaining the amount of hires and profits to which the legatees were entitled. They further state, that **299** no account of such hires can be stated up to the day of the sale of said negroes, as directed by your honor's order of August, eighteen hundred and thirty-eight, because the operation of the decree ordering a sale, is superseded by the appeal bond, and as the Court of Appeals will not review your honor's decree until an account of hires is ratified by your honor, your petitioners, as the case now stands, are without the means of procuring an adjudication upon their rights, and they refer to a copy of the order of the Court of Appeals, dismissing the appeal as aforesaid, marked A, and pray that the same may be taken as a part of their petition. And your petitioners now pray your honor to reinstate the said cause in this Court, and to decide upon the exceptions to the auditor's account for hires and profits, as to your honor may seem right, and to grant them such other and further relief as the nature of the case may require; and they will pray, &c.

Exhibit A.—*Stephen L. Lee vs. Thomas N. Pindle and Wife and others.* Court of Appeals for the Western Shore. December Term, 1840. This appeal being submitted by counsel for the parties, upon the question whether the merits thereof could at this time be considered, and this Court being of opinion that the decree from which the appeal is prosecuted, is not final within the intent and meaning

of the Act to prevent unnecessary expense and delay in prosecuting appeals from Courts exercising equity jurisdiction in this State, passed at December Session in the year eighteen hundred and thirty, chapter one hundred and eighty-five, and that the record thereof ought not to have been transmitted at this time to this Court.

It is thereupon, this sixth day of February, in the year eighteen hundred and forty-one, by the Court of Appeals for the Western Shore adjudged, ordered and decreed, that the said appeal in this Court be and the same is hereby dismissed with costs, and the cause be remanded to the Court of Chancery, that such proceedings thereon may be had as the case may require.

300 * On the 30th March, 1841, the Chancellor (BLAND,) passed the following decree :

In Chancery, March Term, 1841. This case coming before the Court upon the petition of the complainants, filed on the 29th of March, 1841, and upon the agreement heretofore filed, submitting the case upon exceptions, and standing ready for hearing upon the said exceptions, the proceedings were read and considered.

It is thereupon, this thirtieth day of March, in the year one thousand eight hundred and forty-one, by THEODORICK BLAND, Chancellor, and by the authority of this Court adjudged, &c., that the account reported and filed by the auditor, on the 21st of January, in the year 1839, and marked C, be and the same is hereby ratified and confirmed, and that the exceptions thereto filed, be and the same are hereby overruled. And it is further adjudged, ordered and decreed, that the defendant, Stephen L. Lee pay, or bring into this Court to be paid to the complainants and others, the legatees of the said slaves in the proceedings mentioned, the sum of five hundred and ninety-five dollars and thirteen cents, with interest on the sum of five hundred and seventy-five dollars and forty-seven cents, part thereof from the twentieth day of January, in the year eighteen hundred and thirty-nine, until paid or brought in to be paid as aforesaid, and that a further account of the hires and profits of said slaves with their increase, shall be hereafter taken by the auditor from the said twentieth day of January, in the year eighteen hundred and thirty-nine, until the said slaves shall be sold as provided by the decree of the 16th day of March, in the year aforesaid, from the proofs and proceedings now in the case, and from such other evidence as may be laid before him; provided that such proof be taken before some justice of the peace on three days notice as usual, and filed in the Chancery office on or before the final ratification of the sale as before provided.

And it is further adjudged, ordered and decreed, that the said defendant, Stephen Lewis Lee pay, or bring into this Court to be paid to the complainants, their costs in this Court, to be taxed by the register.

• From this decree the said Stephen L. Lee also appealed. **301**

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, and CHAMBERS, JJ.

T. S. Alexander, for the appellant, insisted.—The cause having been submitted on the 16th of March, 1839, the Chancellor passed a decree confirming so much of the auditor's report as stated that the negroes could not be divided, and directed the same to be sold, and thereout the costs of suit to be paid.

From this decree the defendant, Stephen L. Lee, appealed, and on the 6th of February, 1841, the appeal was dismissed by the Court of Appeals, on the ground that the decree was not final.

On the 29th of March, 1841, the complainants filed their petition, praying that the case might be reinstated, and that the Court would decide on the exceptions to the auditor's report.

On the 30th of March, 1841, the Chancellor, without any notice whatever to the defendant, passed a further decree, ratifying and confirming account C, and overruling the exceptions thereto, directing the defendant, Stephen L. Lee, to pay or bring into Court to be paid to the complainants and others, legatees of the slaves, the sum of \$595.13, with interest and costs of suit, and directing a further account to be taken of hires which should accrue until the sale thereof. From this decree the defendant has likewise appealed.

• *J. Johnson*, for the appellees, contended. 1. That upon the true construction of the will and codicil of the testator. **303** the negroes and their increase, were to be divided among the six legatees named in the second codicil, immediately after the death of the widow.

2. That the rights of these legatees to the enjoyment of the property specifically bequeathed to them, did not depend in any degree upon the sufficiency of the provision for the payment of pecuniary legacies, and that consequently the negroes and their profits stand wholly exempt from the claim of the pecuniary legatees.

3. That the only necessary parties to the bill were the executors and the persons among whom the slaves were to be divided upon the death of the widow.

4. That the Chancellor did right in ratifying account C.

STEPHEN, J. delivered the opinion of the Court. In the discussion of this case, several points have been raised and argued by the counsel of the appellant, which this Court now have to consider and decide. The first objection is, that the final decree of the Chancellor was premature, the case not being at that time ready for the judicial action of the Court, we think there is nothing in this objection. Before the first decree was passed, and prior to the first appeal, which was dismissed by this Court as illegally taken, the cause, by consent of parties, had been submitted to the Chancellor upon the auditor's

report, and when the case was dismissed from this Court, and the cause went back to the Court of Chancery for further proceedings, it was brought to the notice of that Court by the petition of the appellee, which placed it in the * same situation as if no appeal had
304 been taken, and the cause had never been removed from that jurisdiction. We think the second objection of the appellant equally untenable and unfounded. No reservation of any equity for further directions was necessary in the first decree for a sale of the negroes, to warrant the Court in granting full and complete relief to the appellee for the hire and annal value of the negroes, when the final decree was passed. The principle seems to be settled, that the Court will not, on further directions, decide a question not reserved by the decree; the rule, however, does not prevent the Court from giving interest on further directions, though the question of interest be not reserved by the decree. For this principle, see 2 *Smith's C. P.* 403, 404. The same principle which would warrant the allowance of interest without any reservation to that effect in the decree, would, we think, upon fair and reasonable grounds of analogy, sanction the allowance of hire and value for the negroes, without any reservation having been made upon that subject, when the decree for a sale was passed. Upon the appellant's third point, which charges error in the principles assumed by the auditor in stating the account, which was adopted by the decree of the Chancellor, we think the objection is well founded, so far as he has relied upon the estimates of witnesses, who did not know the negroes in question. Their estimates ought not to have been mixed up with, and allowed equal weight and influence, with the valuations of those who knew the negroes, and who testified from such, their personal knowledge. An average of hire and value founded upon such a principle, might work great and serious injustice. Proper allowances ought also to be made for the expense of maintaining and clothing the whole, as well those incapable of labor as those who were able to work. The hire of the negro man Abraham, who was drowned, ought to have been carried up to the time of his death; and ought not, certainly, to have been extended beyond that period, as a charge against the appellant. We think there was no error in the charge of interest on the annual hire or value of the negroes' services; at the expiration of each * year he was a debtor to that
305 amount, and interest, we think, was properly charged upon it. We think that the appellant's fourth point is clearly untenable.

The will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable; but if there be any conflict or repugnancy between them, the codicil, as the last indication of the testator's mind, must operate in preference to the will. By the second codicil, the negroes are given to the wife for life, in language too clear to be misunderstood; and at her death the direction is equally explicit, that they are to be divided amongst the legatees therein named. If this construction be correct, the fifth point

is wholly untenable; because the pecuniary legatees, and the personal representative of the widow, have no interest which can be affected by this decree, and are therefore not necessary parties to this suit. From the death of the widow, the hire and profits of the negroes' services ceased to be a fund for the payment of their legacies, and they were no longer interested in any question, touching that subject.

For reasons already assigned, we think that the sixth point, which objects that the suit was prematurely brought, is wholly unavailing. Upon the death of the widow, the right of the specified legatees to call for a distribution immediately attached, and their standing in Court cannot, of course, be impeached, upon the ground that their bill was prematurely filed. The seventh and eighth points relative to costs, cannot be sustained. The principle is well settled, that the question of costs in Chancery is discretionary. At the time of the first decree, the costs were properly charged on the fund, because at that time no improper obstacles had been interposed by the appellant, to the attainment of the objects of the suit; but afterwards the case assumed a different aspect; and the untenable and vexatious grounds of defence taken by the defendant, well warranted the Chancellor in the course which he pursued in his final decree upon the subject of costs, which was, that the defendant, Lee, should pay to the complainants their costs in that Court. Upon the ninth point, we think there is error in * the decree of the Court below.

The distributive share of each legatee should have been liquidated, and finally settled by the decree, so as to prevent all future controversy and litigation upon the subject; an object which the Court of Chancery is always studious to accomplish, and which is the main and leading purpose of the rule, which requires that all proper parties should be made to every suit therein instituted. Upon these views of the case, disagreeing as we do with the Chancellor in the particulars mentioned above, we think that the decree of the Court below ought to be reversed with costs, and the cause remanded for further proceedings according to the principles herein contained.

Decree reversed, with costs.

JOHN BROOKS *vs.* WALTER B. BROOKE and JAMES B. BELT, Adm'r of EDWARD W. BELT, and T. HODGKIN, Adm'r of ALEX. H. BOTELER.—June Term, 1842.

A bill which sets out the previous proceedings of the Court as a portion of the facts out of which the complainants' equity arises, though alleged to be on its face a supplemental bill, yet did not seek to alter or amend any decree or order passed in this cause, is neither a supplemental bill, nor a bill in the nature of a bill of review, but is an original bill.

The general rule is, that a Court of Chancery has no power over the securities of a trustee of the Court, but this has some exceptions. (a)

Where property is sold under a decree of a Court of equity, the proceeds of sale are considered in the custody of the Court, and no person, whether a party to the bill or otherwise, can maintain a suit at law for the recovery of any portion thereof, until the payment of a claim, thus prosecuted, shall have been awarded by the Court, and notice of such award, and a demand of payment, shall have been made of the trustee or other officer in whose hands the funds may have remained as the fiduciary agent of the Court. (b)

But where the trustee is delinquent, and having wasted the fund dies intestate, without any administrator, or estate on which administration could be had, and a claimant could not place himself in a situation to proceed at law, by obtaining a previous award against the trustee, accompanied with notice and demand of payment, then equity will afford relief against the securities. (c)

Evidence by an under clerk employed in the office of a clerk of the County Court, that he had made a careful examination for a trustee's bond, of all the papers connected with the cause in which the bond had been given, and of all the other equity cases in the office since for the original bond, * and could not find it, and did not know where it was

307 to be found, and that every bundle of papers in the office, and every part of the office, where he thought there was a possibility of finding it, he had also examined, and that he verily believes it to be lost, with proof that the bond once existed, is sufficient proof of its loss to warrant the interposition of a Court of equity as far as that fact would give it jurisdiction, but the loss of the bond was not material in this cause.

Where mortgaged premises are decreed to be sold, prior incumbrancers not parties to the bill, nor before the Court, are not bound to seek payment of their claims out of the proceeds of sale in the hands of the trustee to make the sale, and if not paid off, may prosecute their liens upon the lands sold, after the conveyance to the purchaser, notwithstanding he had paid the whole purchase money, and the land had been sold to him by the trustee free from all incumbrances. (d)

Where a trustee for the sale of mortgaged property sells the same free of incumbrances, wastes a portion of the purchase money, and dies in default, without having complied with an order of the Court directing

(a) Cited in *Eden vs. Gary*, 46 Md. 36. See *Boteler vs. Brookes*, 7 G. & J. 104.

(b) Cited in *State vs. Mayugh*, 18 Md. 378; *Thruston vs. Blackiston*, 36 Md. 508; *Gott vs. State*, 44 Md. 339. See *Oyster vs. Annan*, 1 G. & J. 245. Where a trustee dies before the completion of his trust and the ascertainment of his indebtedness to the trust estate, equity will entertain a bill filed against the sureties on his bond, by his successor in the trust, and will decree payment by the sureties of the amount found to be due to the trust estate. *Thruston vs. Blackiston*, *supra*.

(c) Cited in *State vs. Digges*, 21 Md. 243; *Gorsuch vs. Briscoe*, 56 Md. 576; *Brent vs. Maryland*, 18 Wallace, 435.

(d) Relied on in *Cockey vs. Mune*, 16 Md. 207; *Farmers Bank vs. Thomas*, 37 Md. 256; *Walter vs. Riehl*, 38 Md. 217; *Plummer vs. Jarman*, 44 Md. 636; *Duval vs. Speed*, 1 Md. Ch. 236. Distinguished in *Browner vs. Watkins*, 28 Md. 525.

him to pay off the prior incumbrances, and a second trustee is then appointed, the Court may order him, with the funds that come to hand, to discharge these prior incumbrances, in order to protect the purchaser, though the first trustee had received funds sufficient for their payment. Those who lose claims by this application of the funds, could sue at law on the bond of the first trustee, to the extent of the funds wasted, and if, by accident, they are remediless at law, equity will give them relief against the sureties on such bond. (e)

Where a judgment became a lien on the equity of redemption of the defendant, in land previously mortgaged by him, and afterwards on a bill filed by the mortgagee against the mortgagor, the land was sold and the trustee ordered to pay off, first prior incumbrancers, not parties to the proceeding, then the mortgagee, and then, by an informal order, the above mentioned judgment; and the trustee wasted a portion of the purchase money received by him, and a second trustee was appointed who was directed to apply other funds to the payment of the prior incumbrances, whereby the said judgment failed to be satisfied, and the superseder of that judgment was compelled to pay it, and not having a remedy at law against the sureties of the delinquent trustee, by reason of the death of the trustee without administration on his estate, and before the judgment creditor had obtained an order awarding him the sum due on the judgment, and the superseder filed his bill in equity against the sureties of the delinquent trustee, *held*, that the said sureties cannot defend themselves on the ground that the money paid by the second trustee to the prior incumbrancers should have been paid in satisfaction of the judgment: because, conceding that were so, the judgment creditor would be subrogated to the rights of the prior incumbrancers, and would have a remedy by substitution against the sureties of the first trustee, to the extent of the misapplied funds.

By a decree under which a sale was made, the trustee was ordered to report the sale and to bring the proceeds of sale into Court; disobedience to the latter branch of this decree is a breach of the condition of his bond, for which he and his securities may be sued at law by any person who can show himself damnified, and clothed with the requisite authority to sue.

A Court of equity will do nothing to extend the liability of securities beyond the clear intent and import of their contract; but if to such an extent they cannot be held liable at law, by reason of fraud, accident or mistake, equity will, to prevent a failure of justice, interfere, and enforce the execution of their contract according to its obvious meaning and design.

Chancery jurisdiction was originally assumed upon the great principle, that without it there would be a total failure of justice, a Court of law being incompetent to grant adequate relief.

APPEAL from the Court of Chancery. The bill in this cause was filed by the appellant on the 25th August, 1837, and prayed subpoenas against Walter B. Brooke, Alexander H. Boteler, and Edward W. Belt, and commenced—“The supplemental bill of complaint of J. B., shows, that upon a bill of complaint filed in Prince George’s

(e) Cited in *Well vs. Canton Co.* 3 Md. 248, as to payment of prior incumbrances.

County Court as a Court of equity, by Lucy S. Brooke, complainant, against Walter B. Brooke, such proceedings were had, that on or about the 27th July, 1830, a decree was passed in the cause appointing Edward M. Dorsey, since deceased, a trustee, with * authority to sell certain mortgaged premises for the purposes mentioned in said cause, and by said decree, said E. M. D. was required, before he proceeded to execute the trusts thereby reposed in him, to file with the clerk of said Court a bond with security, &c. as trustee, &c.; that the said E. M. D. accepted the said trust, and on or about the month of August, 1830, filed in said Court a bond to the State of Maryland, executed by himself with the said A. H. B. and E. W. B. as his sureties, in the penalty of \$5,000, with the condition, as required by said decree; that afterwards, the mortgaged premises were sold to Richard H. Brookes for the sum of \$11,500; said sale duly reported and confirmed, and the greater part of the purchase money paid to the trustee, E. M. D.; that the mortgaged premises were sold clear of all incumbrances, and that the proceeds of sale greatly exceeded the claim of the complainant: it was by the said Court, on or about the 26th October, 1830, ordered and decreed, that the trustee apply the necessary amount of the purchase money, when received, to the payment of incumbrances existing prior to the complainant's mortgage, and that the residue of the purchase money be brought into Court to be subject to further order; that in obedience to said order, the auditor of said Court, on or about the 11th January, 1831, made a partial report, and thereby applied parcel of the proceeds of the aforesaid sales to the payment of several claims against said estate; that on the 14th January, 1831, a certain Philemon Chew, on behalf of the creditors of himself, and a certain Henry M. Chew, theretofore trading under the style of Henry M. Chew and Company, filed his petition in said cause, and therein alleged, that he had theretofore, for the use of the creditors of H. M. C. & Co., recovered a judgment against the aforesaid W. B. B. for a large sum of money, upon which a writ of *feri facias* was issued, and levied on the defendant's equity of redemption in the aforesaid property, and the petitioner therefore insisted, that the said judgment and execution bound the aforesaid property, and prayed, that the same might be paid and discharged out of the surplus proceeds of sales as aforesaid, and * that upon said petition the said P. G. County Court

309 passed an order, and thereby, amongst other things, directed the auditor of said Court to state an account between the mortgaged estate in the proceedings mentioned, and the late and present trustees applying the balance that will remain of the proceeds of the said estate, after paying off the incumbrances directed to be discharged by the order of said Court in the following order, that is to say; first, to the extinguishment of the debt due the complainants with interest and costs of suit, and secondly, to the extinguishment of the judgment mentioned in the aforesaid petition, and other debts, if any

of a similar grade; that the auditor afterwards reported sundry accounts, and thereby, amongst other things, applied the sum of \$932.54, parcel of the proceeds of sale actually received and remaining in the hands of the said E. M. D., as trustee as aforesaid, to the payment of the aforesaid judgment claim, mentioned in said petition of P. C., and the said auditor having made said sum payable to the creditors of H. M. C. & Co., the said P. G. County Court, afterwards, to wit, &c., ratified the said report, and ordered that the said trustee pay over to the creditors of H. M. C. & Co., the aforesaid sum of money; that after notice to, demand of, and refusal to pay by the said trustee of the said order, an action at law was brought upon the bond of the said trustee to enforce payment of said sum.

The bill further alleged, that execution on the aforesaid judgment had been, some time before the passage of the last order, superseded by the said W. B. Brooke, and the complainant and some other person as his sureties; and that, upon the expiration of the stay thereby obtained, such proceedings were had that your orator was compelled to pay the sum due on the aforesaid judgment; that this payment was made sometime after the commencement of the aforesaid action at law against said trustee and his sureties, and your orator having thereby become entitled to all the rights of the original judgment creditor and to the benefit of all remedies which the said creditor might have used for recovery of his demand, procured the aforesaid action at law, to be entered for his use, * and the same was continued in prosecution by
him until its conclusion, as hereinafter mentioned. **310**

The bill then further alleged, that the said equity cause was removed from P. G. County Court into this Court, and being depending herein, the complainant filed his petition, therein suggesting his rights in the premises, and that the said E. M. D., the trustee, had departed this life, and praying, that the said A. H. B. and E. W. B., as his sureties, might be compelled to pay him, the aforesaid sum of money, upon which said petition such proceedings were had, that the Chancellor passed an order directing the said sureties to pay the aforesaid sum of money to this complainant, but from the said order the said sureties appealed to the Court of Appeals, by which Court the said order was reversed, upon the ground, that this complainant was not entitled to the benefit of a summary remedy by petition and attachment.

The bill further alleged, that the aforesaid action at law was afterwards tried in P. G. County Court, and a verdict was rendered therein for the plaintiff for the whole amount of the demand against the said A. H. B. and E. W. B., (the said Dorsey, the trustee, having departed this life pending said suit,) and judgment was rendered in conformity thereto, but upon an appeal taken, this was also reversed, upon the ground of uncertainty in the description of the persons to whom the aforesaid sum of money was directed to be paid by P. G. County

Court as a Court of equity, so that, although your orator is indubitably entitled to the benefit of the original judgment, recovered by the said Philemon Chew against Walter B. Brooke, and the amount of said judgment is rightly payable out of the proceeds of said sale, yet he is in danger of losing his demand by some oversight or omission of the said Court of equity. But he is advised, that the aforesaid order, directing payment of the aforesaid sum of money unto the creditors of H. M. C. & Co., being, by reason of its generality and uncertainty, adjudged to be inoperative, will be treated by this Honorable Court as a nullity, so far as to entitle him to another order on the report of the auditor aforesaid, directing payment

311 * of the aforesaid sum of money, unto your orator as the equitable assignee and holder of said judgment, or that such order, at his instance, will be reviewed and reversed or modified, so as to assure to your orator, as assignee, the benefit thereof, and that inasmuch as the said E. M. D., the trustee, has long since departed this life intestate, without having any personal representative, and without having any personal estate upon which an administration might be taken out, and without having any other estate whatever, your Honor will proceed at once to give unto your orator an adequate relief, by an immediate decree against the said A. H. B. and E. W. B., as sureties of the said E. M. D. Prayer for general relief.

The answer of A. H. B., admitted the decree upon the bill of L. S. B. The appointment of E. M. D. as trustee, but whether surety of E. M. D. in that case, neither admits or denies, though he was surety for him with E. W. B. in some bond; that he has no knowledge of the sales made by E. M. D., nor the payments made to him as trustee; that large sums of money were paid by the purchaser of the land to E. M. D., as attorney for judgment creditors, and not as trustee. The answer admitted the proceedings in Court, as alleged in the bill, and insisted, that the order ratified in favor of the creditors of H. M. C. & Co., was in full force, having been neither reversed nor appealed from, and that it was not now competent for this Court, in this way, to set aside or modify the same in any manner, and he relies on said order as a bar to the relief now sought, and prays to be allowed every benefit of the same at the final hearing. The answer also admitted, that the judgment against Walter B. Brooke was superseded by the complainant and others; the removal of the equity cause from P. G. County Court to Chancery, and the subsequent proceedings thereon, as also the final judgment upon the case at law, appealed from, as a further bar to the claim. The death of E. M. D., the trustee, was also admitted, but whether intestate or insolvent, this respondent has no knowledge, and that now since his death, it is not in the power of this Court to reverse or modify the order in favor of the creditors of H. M. * C. & Co.,

312 or to adopt any proceedings, or pass any order to affect the rights of this defendant. The answer then denied, that E. M. D.

did, as trustee, receive any money applicable to the payment of the claim now attempted to be charged upon the defendant by this complainant, or to which the creditors of H. M. C. & Co., were ever in any manner entitled; and also the jurisdiction of the Court, and if liable at all, it was at law.

The answer of W. B. B., stated that he had no knowledge of the matters of the bill except as disclosed by the proceedings at law and equity, which he admitted. After the death of E. W. B., his administrator, James B. Belt, answered the bill, and relied substantially on the same defences set up in the answer of A. H. B.

The general replication being filed, the defendants admitted—

1. The recovery of the judgment at law by Philemon Chew, for the use of the creditors of H. M. Chew & Co., against Walter B. Brooke.

2. The supersedeas of that judgment by the complainant and others.

3. The levy of a *fi. fa.*, issued on the supersedeas judgment, on the property of the complainant, and that, in consequence of such levy, he paid the amount due on the judgment to the attorney of the plaintiff, and the judgment was duly assigned to and entered for the use of the complainant.

The other facts established in the cause, appear sufficiently in the opinion of this Court.

When the cause was submitted for final hearing, all objections to the sufficiency of the allegations of the bill and answer were waived, so as to entitle the parties to such decree as they may be entitled to on the proofs, and that a decree may be passed in the Court *pro forma* dismissing the bill, from which the complainant will appeal; and if such decree be reversed, the cause is to be remanded to the Court of Chancery for an account of assets of the original defendants, Boteler and Belt, in the hands of their administrators, with such other directions touching the amount of the plaintiffs' claim or the liability of the defendants therefor, as the Court of Appeals may think right.

* Under this agreement, the Chancellor [BLAND] dismissed the bill, *pro forma*, and the complainant appealed to this Court. **313**

This cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, and CHAMBERS, JJ.

T. G. Pratt and Alexander, for the appellant, contended: 1st. That it clearly appears, that A. H. Boteler and E. W. Belt were the sureties on the bond executed by E. M. Dorsey, as trustee, for the sale of the real estate of Walter B. Brooke.

2nd. That it is clearly established, that the judgment of Philemon Chew against Walter B. Brooke, which was entered for the use of the creditors, Henry M. Chew & Co., was paid by the appellant as

surety for said Brooke, and that the appellant is now entitled to all the rights under said judgment which at any time belonged to the original plaintiff.

3rd. That the fact is clearly established, that E. M. Dorsey, as trustee, did receive a sum of money applicable to the payment of said judgment, and equal to its full payment.

4th. That the order of the 17th April, 1832, directing the payment of the money applied by the auditor to the said judgment, is not sufficient to authorize a recovery at law upon the trustees' bond of Dorsey.

5th. That said E. M. Dorsey being now dead, insolvent and without administration on his estate, no order could be obtained which would authorize a suit at law upon his said bond, and that the only remedy of the appellant is in a Court of equity.

6th. That independent of the last objection, the appellant was entitled to relief in equity on the ground, that the original bond is lost.

T. F. Bowie and *J. Johnson*, for the appellees. The Prince George's County Court in equity, passed a decree on the 27th July, 1830, upon a bill filed by the mortgagee, for the sale of certain property which had been mortgaged by *Walter B. Brooke* to *Lucy S. Brooke*.

314 * *E. M. Dorsey* was appointed trustee to sell, and it is alleged, that the intestates of the appellees became sureties in his bond as trustee. He made the sale on the 9th of September, 1830, to *R. H. Brookes*, who afterwards assigned the purchase to *Otho B. Beall*, by whom certain sums were paid to Dorsey, the exact amount of which does not appear.

Dorsey's appointment was revoked on the 17th of December, 1830, and another trustee appointed in his place.

Prior to the revocation, his sale had been reported to, and ratified by the Court; and the auditor on the 9th of January, 1832, reported three accounts, numbered 1, 2 and 3.

In number 2, the sum of \$932.54 was stated to be due, and payable to "the creditors of *Henry M. Chew and Company*."

Upon this account, the Court, on the 17th of April, 1832, passed the following order: "Ordered by the Court, sitting as a Court of equity, that the within report of the auditor be, and the same is hereby ratified and confirmed, and that *Edwin M. Dorsey*, the trustee, is hereby directed and required to pay over to the creditors of *Henry M. Chew and Company*, the amount appearing to be due to them, by the within report of the auditor."

The claim thus stated to be due to the creditors of *Henry M. Chew and Company*, was founded upon a judgment against *Walter B. Brooke* the mortgagor, rendered at April Term, 1829, for the use of the creditors of *Henry M. Chew and Company*, which judgment was superseded by the complainant and another, and the money

being paid by the complainant, it was endorsed for his use by an order filed on the 15th January, 1833.

Before this, to wit, on the 19th of April, 1832, a suit had been commenced on the bond of the trustee against him, and his alleged sureties, which was afterwards prosecuted for the use of the complainant, and which resulted in a verdict and judgment against the sureties, (Boteler and Belt,) Dorsey the principal being dead, for the amount of the claim.

Upon appeal, this judgment was reversed at December Term, 1836. See 8 G. & J. 359.

*The complainant then, on the 25th of August, 1837, filed the present bill, in which, after setting forth the various proceedings in the case of *Lucy S. Brooke vs. Walter B. Brooke*, and other matters not therein contained, prayed the Chancellor, either to regard the order of the 17th of April, 1832, as a nullity, and to pass another order on the report of the auditor, directing the payment of the money by the defendants to him, or that the order might be reviewed and reversed or modified, so as to give the complainant the benefit of the said judgment as against these defendants, the alleged sureties of Dorsey. **315**

The defendants in their answer, do not admit, that they signed the bond in question, though they do admit, that about its date, they did sign a bond as Dorsey's sureties; but not having themselves read, or heard the condition thereof read, they are unable to say, whether they did sign this particular bond or not.

They do not admit, that Dorsey, as trustee, received any money applicable to the payment of the claim of the complainant, nor that Dorsey in his life-time, was ever served with an order to pay, or that any demand was ever made on him for the payment of the money. They admit the action at law on the bond against them and Dorsey, as alleged in the bill. That there was a judgment against them in the County Court, and that upon appeal, said judgment was reversed, and final judgment rendered in their favor, which they rely upon as a bar to the present proceeding. The defendants allege, that the order of the 17th of April, 1832, is in force, and deny the power of the Chancery to review, or set it aside; and they also insist, that their contract, if they did sign the bond, is a merely legal contract, and cannot be the foundation of a bill in equity.

Proof was taken tending to establish the execution of the bond, and that the original was lost or mislaid.

Evidence, however, was offered on the part of the defendant, that many official copies of the bond are in existence, and on file in the clerk's office, and were so before and at the time this bill was filed, one such attested copy being filed under the commission in this case.

*It was agreed, that the papers in the case of *Lucy S. Brooke vs. Walter B. Brooke*, might be read at the hearing; **316**

that the opinion of the Court of Appeals in the case before referred to, in 8 G. & J. 359, might be read; that Dorsey died intestate without property, and that there had been no administration upon his estate; that objections to the averments of the bill and answer be waived; that a decree *pro forma* be signed dismissing the bill; and that should the Court of Appeals reverse the decree, the case should be remanded to Chancery for an account of assets, and such further directions as the Court might think proper to give.

Upon this agreement, the Chancellor, upon the 2nd of June, 1841, dismissed the bill *pro forma* with costs, and the complainant appealed.

In support of the decree, it will be contended: 1. That it is not competent for the Court of Chancery, either by original or supplemental bill, or by petition, to reverse, alter or review, the decrees or orders of the County Courts as Courts of equity.

2. That if such power can be exercised by the Chancellor in any case, the time which intervened between the order sought to be reversed or altered, and the time of filing the present bill, is an insuperable objection to the exercise of the power in this case.

3. That in no event could the intestates of the appellees be charged by a bill in Chancery, their contract, if they signed the bond, being a strictly legal contract, for which they are liable only in a Court of law.

4. That the evidence shews, that Dorsey, the original trustee, never did receive any money applicable to the payment of the complainant's claim, or at least it does not appear, that he did receive any money applicable to the payment of said claim.

DORSEY, J., delivered the opinion of this Court. Much time has been spent in discussing the question, whether this be a supplemental bill or a bill in the nature of a bill of review, seeking to alter or amend some decree or order, *passed in a cause heretofore depending in Court. In neither of these aspects can it be sustained; nor is it so regarded by us. We deem it an original bill, stating the previous proceedings of the Court, not with a view to their alteration or amendment, but as a portion of the facts out of which the complainant's equity arises. The case of *Boteler and Bell*, 7 G. & J. 143, has been relied upon as a clear adjudication against the rights now asserted by the appellant, and as settling the doctrine, that a Court of Chancery has no power over the securities of a trustee, their responsibility existing only at law. As a general rule, this doctrine is undeniably true; but like other general rules, it is obnoxious to some exceptions, of which we think the case before us is one. The case referred to, in our view of it, contains nothing adverse to the appellant's right to recover in the present form of proceeding; on the contrary, the Court explicitly declares, that it means to express no opinion upon that subject.

Where property is sold under a decree of a Court of equity, the proceeds of sale are considered in the custody of the Court; and no person, whether a party in the suit or otherwise, can maintain a suit at law for the recovery of any portion thereof, until payment of the claim thus prosecuted shall have been awarded by the Court, and (according to the case of *Oyster and Annan*, 1 G. & J. 450,) notice of such award, and a demand of payment, shall have been made of the trustee, or other officer in whose hands the fund may have remained, as the fiduciary agent of the Court. This Court, in the case of *Boteler and Belt vs. State, use of Chew & Co.* 8 G. & J. 360, having, in effect, declared the order in favor of the creditors of Henry M. Chew & Co. a nullity, no order of Court has been passed for the payment of the judgment owned by the appellant, in virtue of his having paid it as one of its superseders. Nor can such an order now be passed—the delinquent trustee, after wasting the fund, having died intestate, without any administration or estate on which an administration could be had. To place himself in a condition to prosecute at law, his claim against the sureties, on the trustees' * bond, is, to the appellant, wholly impracticable; and if relief be denied him, in the mode in which he now seeks it, he is remediless, indeed, both at law and in equity. 318

The search, proved to have been made for the original bond, is, we think, sufficient evidence of its loss to warrant the interposition of a Court of equity, as far as that fact would give it jurisdiction. But, in our opinion, the question of jurisdiction does not depend upon the loss of the bond. If the bond were in existence, the jurisdiction is sustained, if sustainable at all, by the other facts in the cause.

It has been insisted, that E. M. Dorsey, the trustee, having been ordered to pay off the prior incumbrancers, such incumbrancers thereby became creditors of the fund in Dorsey's hands, and were bound to abide its loss by Dorsey's insolvency, so far as the residue of the proceeds of sale and the other claimants thereof, were concerned. And consequently, that the order of Mundel to pay off the prior incumbrancers with the fund to which the appellant and other subsequent incumbrancers were entitled, is erroneous. Without stopping to inquire what benefits would ultimately result to the appellees if the positions thus urged in their behalf were established; and whether, under the well settled principles of substitution, a Court of Chancery would not subrogate the appellant to all the rights of the prior incumbrancers, whose claims being ordered by the Court to be paid by the trustee, for whom the appellees were securities, stand exempt from one of the strongest grounds of defence, which has been relied on in bar of the relief sought by the appellant; let us examine whether the incumbrancers were in the predicament which has been ascribed to them. Had they been parties to the proceedings before the Court, the consequences asserted by the appellees might have

been urged with much plausibility. But these incumbrancers were never before the Court, nor made parties to its proceedings, and were in no wise bound to seek payment of their claims out of the proceeds of sale in the hands of the trustees, and if not paid off, might have prosecuted their liens upon the lands sold after their conveyance to the purchaser, * notwithstanding he had paid **319** the whole purchase money, and the land had been sold to him by the trustee free from all incumbrances. To rescue the purchaser from such glaring injustice and oppression, the Court very properly, on the failure and inability of Dorsey to pay them out of the funds in his hands, ordered their payments by Mundel, the second trustee.

It has been stated by the appellees' solicitor, that there was no breach of the bond in the life-time of the trustee, he having complied with every order of the Court obligatory upon him. This statement, we conceive, is not warranted by the proofs and proceedings before us. By the original decree, under which the sale was made, the trustee was ordered to report the sale and to bring the proceeds of sale into Court; the latter branch of which order he has wholly disobeyed, and thus broken the condition of his bond. For the consequences of which breach, both he and his securities are liable to be sued at law by any person who can shew himself damnified thereby, and clothed with the requisite authority to sue. A forfeiture of the bond, attended with similar consequences, occurred when the trustee failed to comply with the order of the Court of the 26th of October, 1830, commanding him to pay off the prior incumbrances, and to bring into Court the residue of the purchase money in his hands. At law, then, the securities were not only not absolved from their contract, but were liable to be sued thereon, the moment the requisite sanction to the claims should be given by the Court in which the proceedings were pending. Is it then consistent with reason or equity, that a violated contract, in full force and operation at law, should be discharged by the mere accidental circumstances of the trustee's death, before the final adjudication of the Court, upon the claims before it? But it is said, that the order of the 26th of October, 1830, to pay off prior incumbrances, is a rescission of that part of the original decree, requiring the proceeds of sale to be brought into Court. This is not the fact. The funds being retained by the trustee, instead of being brought into Court, no other order could well be passed, consistently with the existing condition of things. The order * too of the 26th of October, was not confined to the **320** payment of prior incumbrances, but enjoined the trustee to bring into Court the residue of the proceeds of sale remaining in his hands, after the making of such payment. Thus, in respect to such residue, reiterating the order in the original decree, as to the bringing into Court of the proceeds of sale. Upon both branches of this latter order, was the bond of the trustee forfeited in his life-time: and the liability of him and his sureties, to be sued at law for such

forfeiture, fixed and undeniable; the commencement of suit being delayed only until the damnified party should have been recognized as such by the Court; and he should have gone through the form of notice to the trustee and demand of payment. If relief in the mode in which he has now sought it, be denied to the appellant, he is wholly without remedy. And what is it that has placed him in this lamentable condition? The simple accident, that before payment of his claim has been ordered, and notice given and demand made, the trustee has departed this life. To place himself in a condition to assert his rights in a legal forum, has by this accident, become impracticable. Can a stronger case than that now before us, for the interposition of a Court of equity upon one of its well established heads of equitable jurisprudence, be well imagined, unless indeed the objection to relief set up by the appellees, on the ground of their suretyship, can be sustained. The appalling consequences resulting from such a defence, are such, that before it would be sanctioned by any Court, much less a Court of equity, the most imperative and unanswerable authorities must be adduced to support it. To none that we regard as such, have we been referred. It, in fact, establishes the principle, that whenever a trustee, having funds in his hands arising from property sold under a decree, dies before the appropriation of the fund amongst the claimants has been ordered by Court, and a demand of payment, accordingly made of the trustee, his securities in his bond are absolved from all liability thereon. In support of this starting proposition, the solicitor of the appellee asks, "Will you do any thing to enlarge the liabilities of securities?" A Court of equity will do nothing to extend **321** the liability of securities beyond the clear intent and import of their contract. But if to such an extent they cannot at law be held liable, by reason of fraud, accident or mistake, a Court of equity, to prevent a failure of justice, will interfere, and enforce the execution of their contract according to its obvious meaning and design. As authorities for this, see the cases of *Crosby vs. Jonathan Middleton Colleson and al.*, Pre. Ch. 309; *Skip vs. Husy and al.*, 3 Atk. 93, and *Berg vs. Radcliff*, 6 John. C. C. 302. The death of E. M. Dorsey, under the circumstances in which it took place, is such an accident as would entitle the appellant to relief in a Court of equity in the manner in which he seeks it.

But suppose, that we are wrong in sustaining; under the circumstances of this case, the jurisdiction of the Chancery Court on the ground of accident, it ought to be sustained upon that great principle in which Chancery jurisdiction was originally assumed—that without it, there would be a total failure of justice, a Court of law being incompetent to grant any adequate relief. This doctrine is fully supported by the Supreme Court of Appeals of Virginia, in the case of *Spotswood vs. Dandridge and others*, 4 Munford's Rep. 289. A case in principle not distinguishable from that before us. In Vir-

ginia, if an executor commits a devastavit, suit upon his bond, against his securities, cannot be maintained, until the devastavit against the executor be established in a suit at law. In the case cited, the executor died without any personal representation after a devastavit, but before its establishment by suit. Relief was granted against the sureties on their bond by a bill in Chancery. Speaking in reference to proving the devastavit otherwise than by a suit at law, the Court say, "if this cannot be done in one tribunal, owing to its particular forms of proceeding, it may be done in another, for it is a fundamental principle, that there is no right without a remedy." This case is cited with approbation in the case of *Carow, Ex'r of Mowatt vs. Mowatt's Adm'r*, 2 *Edwards' Oh'y Rep.* 57, where it was decided,

322 that an administrator committing a devastavit, * being dead, before action establishing it at law, a Court of equity will take cognizance of a suit against his sureties or their representatives, and the persons interested in any estate he may have left, and make them liable for waste or misapplication of assets. But this would not be done in an ordinary case, where the administrator is in full life and within the reach of a Court of law. The same principle is settled in *Moore and al. vs. Armstrong and al.*, 9 *Porter's Reports*, 697, where the administrator being dead and insolvent, a bill in Chancery was filed against his surviving surety and the executors of his deceased surety. The right thus to proceed in Chancery was fully recognized, although no previous judgment was obtained at law against the administrator; the Court, at the same time, declaring, "that no one can proceed against the sureties in the administration bond, at law, who has not first recovered a judgment against the administrator." That "there is nothing in the constitution of a Court of equity which should induce it, in an ordinary case, to depart from the rules of law in the administration of justice, yet, as its mode of procedure is materially different, more enlarged and liberal, it must of necessity take jurisdiction of cases which the ordinary forums cannot reach." And the Court further add, that if it were not allowable to proceed against the sureties alone, "the plaintiffs, though they had just ground of complaint, would be remediless. This cannot be, for it is the just boast of the common law, that every right has its appropriate remedy, if not in the ordinary forum, at least in Chancery, which exercises an extraordinary jurisdiction."

This Court will sign a decree reversing, with costs, the *pro forma* decree of the Chancellor, and making such provision for the final adjudication of the rights of the parties in this cause as is in accordance with their agreement in the record.

Decree reversed with costs, and cause remanded.

*BENJAMIN LEE vs. Administrators of BOTELER and **323**
BELT.—June, 1842.

Where there is a senior and a junior mortgage, by the same mortgagor, of the same land, to different parties, and both file a bill, and obtain a decree for a sale, but the sale in fact took place under the proceedings upon the senior mortgage, there is no objection to the junior mortgagee claiming payment of his debt out of the surplus, after the discharge of the elder mortgage debt. (a)

It is in many instances perfectly consistent to pursue two different remedies, when either may avail, taking care only to obtain the fruits of one.

Where an audit is confirmed by a Court of equity, the approved practice is also to pass an order to pay the claims which were thereby allowed; but the judgment of the Court is effectually pronounced on a claim by confirming the auditor's report, if no steps are taken to revoke or overrule it.

APPEAL from the Court of Chancery. The bill in this case was filed on the 6th April, 1835, by the appellant, and alleged, that in a suit in equity in Prince George's County Court, between Lucy S. Brooke, complainant, and Walter B. Brooke, defendant, such proceedings were had that on the 27th July, 1830, a decree was passed for the sale of certain mortgaged premises; that E. M. D. was appointed trustee to make said sale; gave a bond with A. H. B. and E. W. B. as his securities, which was approved and filed in the said cause; that E. M. D. made and reported a sale, which was ratified by the Court; that anterior to the time of the execution of the said mortgage, sundry judgments were obtained against W. B. B., and that after the execution of the said mortgage, on the 15th June, 1829, he executed another mortgage of same lands to the appellant, to secure a sum due him; that the proceeds of the mortgaged premises having been more than sufficient to pay off the first mortgage debt, and judgments before the mortgage, other creditors, and among the rest the appellant, were permitted to come in and be made parties to the proceedings in said suit; and thereupon orders were passed by said Court, sitting as a Court of equity, whereby it was referred to the auditor of said Court to state an account, who made a report and account, showing the sum due the appellant \$——; that said E. M. D. was removed from his *trusteeship, and A. M. was appointed in his place, but previously **324** the said E. M. D. had received considerable sums of money, and the money in his hands was charged with the payment of the claim of your orator, as will be seen by reference to the report and statements aforesaid; and a further report having been made by the auditor of

(a) Approved in *Ducker vs. Belt*, 3 Md. Ch. 17.

the said Court, showing that the money in the hands of the said E. M. D., as trustee, was sufficient to pay (in addition to other liens of an elder date,) the claim of the appellant, the said County Court did, on the 17th April, 1834, ratify and confirm the said report; that the proceedings of the said cause in the year 1834 were duly transmitted to the High Court of Chancery, to which reference is craved; that E. M. D. died intestate and insolvent; and that no letters of administration have been granted on his estate; that his successor in the trust, A. M. is also dead; that appellant could not obtain from said E. M. D., in his life-time, payment of his said claim, and that since his death he has demanded payment of his sureties A. H. B. and E. W. B., who refused to pay the same; that the said sureties are answerable on their bond for the same; that appellant could have recovered on such bond, but after diligent search made for said original bond it cannot be found, having been, as it is believed, fraudulently taken out of the office of the clerk of P. G. County Court and destroyed, by reason of which your orator would be unable to produce the same, if the execution thereof was denied, and the same not having been recorded, the appellant is unable to obtain an authenticated copy of the same, upon which to proceed at law: by reason whereof the appellant is without remedy, except by the interposition of this Court, in which a person having a claim upon a bond which has been lost, can obtain a relief in the same manner as he can obtain it at law upon the bond, if in existence and in his possession. Prayer for general and special relief.

The audit filed with the bill shewed an account between the mortgaged estate of Walter B. Brooke with E. M. Dorsey, the former trustee, and allowed the appellant on his mortgage dated 15th June, 1829, \$1,338.26, out of the proceeds of the sales, which amounted to \$11,500.

325 *The defendants, the securities, A. H. B. and E. W. B., who are since dead, answered the bill, and put the appellant to the proof of his case, and also denied the jurisdiction of the Court. Proof was taken to establish the facts of the bill; and that the appellant had filed a bill on the equity side of P. G. County Court, against W. B. B., on his mortgage of the 13th June, 1829, and obtained a decree for a sale. The Chancellor (BLAND,) dismissed the bill *pro forma*, and by consent of parties. The complainant below appealed.

The appeal was argued before BUCHANAN, C. J., STEPHEN, DORSEY, and CHAMBERS, JJ.

Pratt, and A. C. Magruder, for the appellant, cited *Boteler vs. State*, 5 G. & J. 520; *Boteler and Brooke vs. John Brooke*, 7 G. & J. 143.

J. Johnson and T. F. Bowie, for the appellees.

CHAMBERS, J. delivered the opinion of the Court. The claim upon which this suit is founded, like that in the preceding case, against the same appellees by John Brookes, was originally due from Walter B. Brooke, and was filed in the case of Lucy S. Brooke against him.

With the exception of a very few and unimportant particulars, it is subject to the same considerations, and must be decided by the same principles.

Besides the defences common to the two cases, the appellees have in this case urged—

1st. That the appellant has resorted to a different mode of proceeding, and

2ndly. That no order for the payment of the claim was ever passed in the cause of *Lucy S. Brooke vs. W. B. Brooke*.

The appellant's claim arises on a mortgage executed to him by W. B. Brooke, junior in date to the mortgage to Lucy S. Brooke, and for the same land. Pending the proceeding, and, as it would seem, before the decree in the case of Lucy S. Brooke, the appellant filed a bill to July Term of Prince George's County Court against W. B. Brooke, to sell the mortgaged property, and obtained a decree at the same term, it is said—for amongst other evidences on this record, of a want of proper and usual attention to the preparation and arrangement of the proceedings, it is quite a curious as it certainly is a novel fact, that the decree is neither signed by one of the Judges of the * Court, nor has it any date upon its face by which to de-
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termine when it passed. The decree in the suit by Lucy S. Brooke, on the elder mortgage, was obtained on the 27th July, in the same year, appointing a different trustee, who doubtless proceeded promptly to execute it, as the sale by him was actually made on the 9th September, following.

It is, then, perfectly manifest, that the appellant did not derive any benefit from the proceeding instituted by him, and it would be as much at variance with the plain demands of justice and equity, as it is against the principles of the law, and the decisions of this Court, to make the fruitless attempt to obtain relief by one process, a bar to the pursuit of another. It is in many instances perfectly consistent to pursue two different remedies, when either may avail, taking care only to obtain the fruits of one—much more allowable is it to resort to a second remedy, when, by a circumstance not arising out of any act or omission of the party prosecuting, the first remedy attempted becomes unavailing. Nor do we think the second objection noticed well founded.

It certainly would have been more in conformity to the approved practice, to have accompanied the order of confirmation with an order to pay the claims which were thereby allowed.

It may be, that the peculiar circumstances of the case created some difficulty in respect to the proper person by whom the payment

should be made. The decree required the trustee to sell for cash, and bring the proceeds into Court.

Another decree or order had dismissed the first trustee and appointed a second—each of the trustees had acknowledged the receipt of a part of the proceeds of sale—various orders had been passed directing the application of the funds in the hands of the trustees, and so much difficulty and confusion was produced by the failure of the first trustee to account for the proceeds of sale, as his duty required, that it is now made a grave question in the argument of this cause, whether the funds received by the first trustee were applicable

329 to the * payment of appellant's claim. That question has been disposed of in the opinions expressed in the previous case, and it is now therefore made to appear, that the order would have been rightfully made upon E. M. Dorsey, the first trustee. But we cannot agree, that the failure so to make it, affected the validity of the claim.

The judgment of the Chancery Court is effectually pronounced on a claim by confirming the auditor's report, and if no steps are taken to revoke or overrule such judgment, it is as conclusive as if it had been accompanied with an order on the trustee to pay the amount. After such adjudication upon the rights of the party, an order to pay, would at any time be passed as a matter of course.

The Court, for the reasons assigned in the previous case, do not regard the other grounds of objection sufficient to defeat the appellant's right to recover, and will therefore sign a decree which shall, pursuant to the agreement in this cause, remand the case to the Chancery Court, that an account may be taken of the assets of the original defendants, and such other proceedings be had as may be necessary to give to the appellant the relief to which he is entitled.

Decree reversed with costs, and cause remanded.

RANDALL HALL and others vs. THE STATE—BENJAMIN T. PIN-
DLE, Informer.—June, 1842.

Where a Justice of the Peace, professing to act under the authority of an Act of Assembly, adjudges a fine to be due, the party sentenced may remove the sentence to the County Court by writ of *certiorari*, and the *certiorari* being there quashed, and the cause remanded, the same party may by writ of error bring the record from the County Court to the Appellate Court, where, if the justice have no jurisdiction, the judgment of the County Court will be reversed, and the proceedings quashed. (a)

(a) Approved in *Randle vs. Sutton*, 43 Md. 67; *Rayner vs. State*, 53 Md. 377. See *R. R. Co. vs. Condon*, 8 G. & J. 285, note.

WRIT OF ERROR to Anne Arundel County Court. On the 17th February, 1842, the plaintiffs in error filed their *petition addressed to the Judges of Anne Arundel County Court, stating **330** that on the 15th day of February, 1842, W. G., Esquire, one of the justices of the State of Maryland, in and for A. A. County, adjudged and ordered that they pay the sum of fifty dollars per week, commencing from the first day of January, 1837, up to the said 15th day of February, for having come into this State, contrary to the Act of Assembly, passed at December Session, 1831, chap. 323, a copy of which order and judgment they herewith submit as a part of their petition, by which they aver, that they have suffered wrong, for that the said justice had no jurisdiction in the premises, and the said judgment is in other respects erroneous, as they are advised. They, therefore, pray your honors to grant to them the writ of *certiorari*, to be issued by the Clerk of Anne Arundel County Court, and directed to the said W. G., Esquire, ordering and commanding him to certify and return his judgment, and all other proceedings in the premises, touching your petitioners, to this honorable Court, to be heard, adjudged and determined by this honorable Court, as to law and justice shall appertain. CORNELIUS MOLEAN,

THOS. S. ALEXANDER, for Petitioners.

To this petition was appended an affidavit by one of the attorneys of its truth.

The judgment referred to was as follows:

State vs. Randall Hall, Kissey Lane, Henry Lane, Richard Lane, Mary Lane. February 15, 1842. It is on this 15th day of February, 1842, adjudged and ordered, that Randall Hall, Kissey Lane, Henry Lane, Richard Lane, Mary Lane, pay the sum of fifty dollars per week, commencing from the 1st of January, 1837, up to this time, for having come into the State contrary to the Act of Assembly, passed at December Session, 1831, chap. 323. Witness my hand and seal, this 15th day of February, 1842. W. GLOVER, [Seal.]

The Honorable NICHOLAS BREWER, A. J., of A. A. County Court, ordered the *certiorari* as prayed. It was issued on the 17th February, 1842, directed to W. G., Esq., J. P., and commanded him to send under his hand and seal, the record of *the proceedings **331** aforesaid, in the plea aforesaid, with all things touching the same, &c., unto the County Court, &c., to be held on the 3d Monday of April next, at, &c., when both parties appeared in the County Court—and the justice aforesaid, made his return to the Court with the writ aforesaid, as follows:

State of Maryland—Benjamin T. Pindle, Informer agst. Randall Hall, Kissey Lane, Henry Lane, Richard Lane and Mary Lane. February 15, 1842. This case having been heard and considered, it is this day adjudged and ordered, that Randall Hall, K. L., H. L., R, L. and M. L., who have been proved before me to be free negroes immigrating to this State from the State of Virginia, in the year

1836, and remaining in it contrary to the provisions of the Act, entitled, an Act relating to free negroes, passed at December Session, 1831, chap. 323, each pay to the sheriff of Anne Arundel, the sum of fifty dollars per week, for each and every week, commencing from the 1st day of January, 1837, and ending the 10th day of February, 1842, and each and every of said negroes refusing or neglecting to pay said fine, to be sold by the said sheriff at public sale, for such time as may be necessary to pay said fine, he first giving ten days notice of such sale. The said sheriff, after deducting prison charges, and a commission of ten per centum, to pay over one-half of the net proceeds to the informer, and the balance to the County Commissioners for the use of the county.

WM. GLOVER.

To this was appended the certificate of said justice, under his hand and seal—"that by virtue of the annexed writ, to me delivered, hereby certify the record and proceedings in the suit in the said writ mentioned, unto Anne Arundel County Court, together with all things touching the same, as fully and wholly as the same is now depending before me." Given, &c.

Thereupon, the State prayed that the said writ of *certiorari* be quashed, and a procedendo awarded to the said justice, because—

332 1st. The County Court has no jurisdiction to order the writ of * *certiorari*, to bring the proceedings of the justice before them in the present case for revision.

2nd. Because conceding the power of the Court to issue the writ, still as the justice had jurisdiction to pass the judgment which he has returned, this Court cannot interfere with such judgment, and should award a procedendo.

The County Court [DORSEY, C. J., and BREWER, A. J.,] quashed the writ of *certiorari*, and remanded the cause to the justice for further proceedings, upon which the writ of error was sued out from the Court of Chancery.

The Act of 1831, chap. 323, sec. 1, under which the judgment in this case was rendered, declared, "that after the passage of this Act, no free negro or mulatto shall immigrate or settle in this State; and no free negro or free mulatto, belonging to any other State, district or territory shall come into this State, and therein remain for the space of ten consecutive days, whether such free negro or mulatto intends settling in this State or not, under the penalty of fifty dollars for each and every week, such person coming into, shall thereafter remain in this State; the one-half to the informer, and the other half to the sheriff, for the use of the county, to be recovered on complaint and conviction before a justice of the peace of the county in which he shall be arrested; and any free negro or mulatto refusing or neglecting to pay said fine or fines, shall be committed to the jail of the county, and shall be sold by the sheriff at public auction, for such time as may be necessary to cover the aforesaid penalty," &c. See Act of 1839, ch. 38, *post*, 335.

The writ of error was argued before BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

At this term, the defendants in error moved to dismiss the writ.

Murray, in support of the motion, maintained—that error would not lie in this case upon the principles of the common law, out of which the Court could not look. The whole original jurisdiction of this State, in criminal matters, is vested in * the magistrates and County Courts. These have a jurisdiction by statute, and all the **333** Courts of criminal jurisdiction are on a level, except where appeals are given by Act of Assembly. There is no case of a writ of error from the County Courts, directed to the magistrates' Courts, yet the County Courts have the powers of the Court of King's Bench, *Latrobe*, 107, except where restrained by statute directly, or by judicial construction. The authority given to the justice to try this case is an exclusive power, and independent of the County Court. No appeal is given. *Hartley qui tam. vs. Hooker, Cowper*, 523. Where a new offence is created, and directed not to be tried according to the course of the common law, writ of error will not lie. 2 *Coke*, 283 b. Error lies to pronounce upon the error of a Court of record—error of judgment only. But the justice is not a Court of record. A *certiorari* will not lie where error will. 1 *Salk*. 63, 144. A writ of error lies to an inferior Court, which proceeds according to the course of the common law. Writs of error lie only to Courts of common law. 2 *Co. a*, 260, Then, are the proceedings in this case according to the course of the common law? It is a summary proceeding; no pleadings; no trial by jury; not according to the course of that law. Error will not lie then. Has the cause been amended by the action of the County Court? The *certiorari* was error. Again, error will not lie where proceedings in any of their stages are not according to the course of the common law. *Melven vs. Bridge*, 3 *Mass.* 305; *Ruhlman vs. Commonwealth of Penn.* 5 *Binny*, 24.

A *certiorari* is not in the nature of a writ of error, and there has been one review already of this cause in a Court of superior jurisdiction. Will this Court in effect sanction a double appeal? The case of *W. & S. Railroad Co. vs. Condon*, 8 *G. & J.* 443, shows the duty of the County Court where no appeal is given in cases of condemnation, and so here.

Alexander, against the motion to dismiss—The *certiorari* issued properly. May error then act on that writ, and the judgment upon it. Does the further remedy * exist? *Certiorari* is a common law **334** writ, and proceeds from a common law Court. Our object is to review the judgment of a Court, and no more. 4 *Inst.* 21; 6 *Comyn Dig.* 441; 10 *Viner*, 22; 3 *Black.* 35, 411; *Fitzh. N. B.* 21.

In 1 *Lev.* 149, *Cornhill's Case*. The judgment of an inferior Court was removed by *certiorari* to the King's Bench, and then by error to the House of Lords. 2 *Salk.* 504.

In New York, a more extensive jurisdiction is exercised. *Clason vs. Shotwell*, 12 John. 31, 43, 60, 66; *Melvin vs. Bridge*, 3 Mass. 305; *Ruhlman vs. Commonwealth of Penn.* 5 Binny, 24. This case merely shows, that appeal is not the remedy. 8 G. & J. 443.

There is no case, civil or criminal, in which the record disclosed error in matter of law, in which this Court has refused to exercise the reviewing power.

1. An appeal will lie on a motion in arrest of judgment—or writ of error will lie, and it is not so in England. *Charlotte Hall School vs. Greenwell*, 4 G. & J. 407; *Noland vs. Ringgold*, 3 H. & J. 216.

2. An appeal will lie from a judgment on an award.

3. Upon a case stated an appeal will lie, and it is not necessary to reserve the right of appeal.

4. Various cases, not according to the course of the common law. Motions to quash executions. Appeals allowed in various cases distinguishable from the English rule. The counsel here referred to—*Nesbit vs. Dallam*, 7 G. & J. 494; *Harden and Carson vs. Moores*, 7 H. & J. 4; *Charlotte Hall School vs. Greenwell*, 4 G. & J. 408; *Waters vs. Duvall*, 6 G. & J. 76; *Turner vs. Walker*, 3 G. & J. 377; *Wall vs. Wall*, 2 H. & G. 81; *Johnson vs. Medtart*, 4 H. & J. 24; *Michael vs. Schræder*, 4 H. & J. 227; *Queen vs. Neale*, 3 H. & J. 158. Error apparent on the face of the record will be reviewed. *Queen vs. State*, 5 H. & J. 232.

Error lies *ex debito justitiæ*. There many offences over which some of our judicial institutions have exclusive jurisdiction, and the citizen would be without redress for excess of jurisdiction, usurpation—if the principles of this motion were to prevail.

335 **J. Johnson*, in reply: This Court has no jurisdiction over the County Courts, sitting in review over the proceedings of magistrates. In such cases no appeal is given by the Act creating this offence. The case in 3 Mass. 305, is like the one at bar, and in *Williamson vs. Carnan*, 1 G. & J. 196, the extent of this authority is stated. *Ruhlman vs. Commonwealth*, 5 Binny, 24; *Isaac vs. Clarke*, 9 G. & J. 107, are conclusive of this motion.

The Court having overruled the motion to dismiss the writ of error, the cause was further argued.

Alexander, for the plaintiff in error: We are concerned here with the judgment, the conviction pronounced by the justice. It took place under the 1st section of the Act of 1831. By the Act of 1839, chap. 38, an additional supplement to the Act of 1831, “no free negro or mulatto belonging to or residing in any other State, shall come into this State, whether such free negro or mulatto intends settling in this State or not, under the penalty of twenty dollars for the first offence,” and no free negro or mulatto shall come into this State a second time where he or she has been arrested under the provisions of this Act, under the penalty of five hundred dollars—one-half, &c., to be recovered on complaint and conviction before the

County Court of the county, or during the recess of the Orphans' Court of said county in which he or she shall be arrested—on refusal to pay the offender, to be committed and sold, "to serve in the character and capacity of a slave," &c.

If the whole, or any part of the Act of 1831, is inconsistent with the Act of 1839, it is repealed. Under the first Act, no negro can come into Maryland and there remain ten days—under the latter, the coming in is the offence; the first relates to States, districts or territories—the latter only to States from whence, &c. The one imposes a penalty of \$50; the other of only \$20. The first gives jurisdiction to a single justice; the latter to the County Courts and Orphans' Court. The Act of 1831 imposes a fine only on the first offence. That of 1839 creates *a second offence. In the one case, the offender is to be sold for a fine; in the other "as **336** a slave for life;" and lastly, the penalty when received is differently distributed.

Then this was no offence at common law. It was first made an offence by the Act of 1806, chap. 56. 9 *Law. Lib.* 32; 1 *Eng. Crown Cases*, 429; *Miller's Case*, 1 *Sir W. Black.* 451; *Rex vs. Edward Caton*, 4 *Burr.* 20, 26.

Where a subsequent statute revises the whole subject-matter of a former one, and is intended as a substitute for it, it is a repeal. *Leach Cro. Cases*, 253; *U. S. vs. Passmore*, 4 *Dallas*, 372.

A second penalty, enacted for the same offence, is a repeal of the first; there is no right of election in the public to proceed for either. *Nichols vs. Squire*, 5 *Pick.* 168; *Commonwealth vs. Cooley*, 10 *Pick.* 39.

There can be no judgment for a penalty except under a law in force at the time of the judgment. *Commonwealth vs. Marshall*, 11 *Pick.* 350.

The Act of 1839 is a repeal of the Act of 1831. They are inconsistent with each other, which disposes of this proceeding.

S. Pinkney, for the defendant in error, referred to the Acts of 1806, ch. 56; 1831, ch. 323; 1839, ch. 38, and maintained that the Act of 1839 was merely a supplement to the Act of 1831, and not designed upon established rules of construction to interfere with it. The first related to cases coming in and remaining, and imposed a higher penalty than upon those who merely came in, and did not remain ten days, but remained long enough to incur the penalty of the lesser amount under the Act of 1839. He cited *Dwarris on Stat.* 631; 1 *Salk.* 263.

Murray, on same side: The writ of *certiorari* improperly issued. The magistrate, with reference to this offence, is not an inferior Court, and hence not amenable to that writ. Neither is his a Court of common law, nor of record, and there is no record to certify to the County Court. *Fitz. N. B.*; 2 *Co. Lit.* 260, a; *Evans' Practice*, 384.

337 * Cases in which the writ of *certiorari* has been granted in Maryland will be found in 1 *H. & McH.* 186; 3 *H. & McH.* 122, 348. It was refused. *Ibid.*, 352.

It is said in *Kilty's Report on the Statutes*, 278, "If on *certiorari* it be returned that the prisoner is condemned by judgment, he shall be remanded. 2 *Hen.* 5, *st.* 1, *ch.* 2.

There was no notice of intent to sue out *certiorari*. *Commonwealth vs. Downing*, 6 *Mass.* 72; 1 *Burr.* 1840; *Hartly vs. Hooker, Cowper*, 523.

There is a right vested in the informer under the Act of 1831, and the Legislature cannot repeal it. 2 *Lev.* 227; 3 *Black.* 160.

McLean, in reply: The Act of 1839 was a merciful modification of the Act of 1831. It assumed that a single penalty of twenty dollars might keep this class of persons out of the State; a penalty which they could pay, and be not subject to sale as slaves. Both cannot be in force, occupying common ground, and imposing penalties for the same Act. *Cro. Jac.* 644; *Leach Cro. Cases*, 252, 253.

The judgment was passed in 1842. It was for a money penalty, a debt accruing weekly from 1837, until the rendition of the judgment. By the Act of February, 1777, chap. 6, it is declared, that no "prosecution or suit shall be commenced for any fine, penalty or forfeiture, unless within one year from the time of the offence committed." The judgment upon its face is barred by that Act. This Court cannot deal with it or modify it. The facts of the cause are not here, and this Court has no jurisdiction to examine them. It cannot decide from what period, if any, within the year, the penalty should commence. The parties were in Maryland when the Act of 1839 went into operation, and there is no case under that Act.

The writ of *certiorari* is essential to the liberty of the citizen; it is especially so in those cases of summary jurisdiction before magistrates with power to fine, imprison and sell, and no remedy by appeal secured. It goes to Courts of record with cause; and to Courts not of record as a matter of course, to correct their errors in matters of

law, and indeed is never withheld. * The statute 2 *Hen.* 5, **338** does not apply to this State. As to the nature of the writ, he cited 2 *Comyn Certio. A.* No. 1, 187; 1 *Lord Ray.* 580; 1 *Salk.* 544.

BY THE COURT—

Judgment of Anne Arundel County Court reversed, and judgment of the justice of the peace quashed for want of jurisdiction.

WILLIAM HOUSE *vs.* SAMUEL WILES.—June, 1842.

The record of a decree of a Court of equity for the sale of land, in which infants are concerned, upon the allegation that it was not susceptible of division between them and the other parties interested therein, is ad-

missible as evidence in another action, as a link in a chain of title in behalf of a purchaser under the decree, although no testimony was taken in the cause in which it was pronounced, nor other proof than the answers of the infants by guardian admitting the facts of the bill.

(a)

APPEAL from Frederick County Court. This was an action of ejectment brought by the lessee of William House against Samuel Wiles, tenant in possession, on the 19th February, 1833, to recover a tract of land. The defendant pleaded not guilty, and took defence on warrant.

At the trial of the cause the plaintiff offered evidence of his title, which included, among other documents, the record of certain proceedings on the equity side of Frederick County Court, to sell the real estate of a certain Daniel House, on the ground that it would not admit of division among all the parties entitled, without injury and loss to all concerned; but that it would be for the interest of all said tenants in common, to have the said real estate sold by a trustee appointed for that purpose, and the money, the proceeds, distributed under the direction of this Court as a Court of equity. Prayer accordingly. The bill alleged that several of the defendants were infants, who answered the bill by a guardian appointed for that purpose, under a commission from Frederick County Court, and admitted all the facts charged. The adult defendants * consented to a decree on the 7th June, 1832, without a commission being **339** issued to take testimony; the County Court decreed a sale of the land, and it was sold to the lessor of the plaintiffs and the sale duly ratified.

To the admissibility of which said decree, and the proceedings on which the same is founded, to shew title in the plaintiff, the defendant by his counsel objected, on the ground that there were infants who were parties defendants in said bill, and no proof or evidence, other than the mere answers of said infants, was taken or offered in said case to support the allegations in the said bill of complaint, or to prove that a sale of the land mentioned in said proceedings would have been for the benefit and advantage both of the said infants and the other persons concerned, without which being made to appear to the Court by testimony, other than the admission in the said answers of said infants, the said equity Court possessed no power or jurisdiction to pass said decree; which said objection the Court [BUCHANAN, C. J. and BUCHANAN, A. J.,] sustained, and refused to let the said decree and proceedings go to the jury as evidence of title on the

(a) Cited in *Davis vs. Helbig*, 27 Md. 466; *Downin vs. Sprecher*, 35 Md. 479. Cf. *Kent vs. Taneyhill*, 6 G. & J. 1. The judgment of a Court of competent jurisdiction, coming incidentally in question in another Court, is conclusive. *Raborg vs. Hammond*, 2 H. & G. 33, note.

part of the plaintiff, on the grounds on which the same was objected to by the defendant's counsel; to which refusal and opinion of the Court, the plaintiff by his counsel excepted.

And the verdict and judgment being against him, he prosecuted the present appeal.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

T. C. Worthington and Palmer, for the appellants. This decree, which relates to the same land as that claimed, and passed in a cause over which the County Court had jurisdiction, is proper evidence. It is collateral evidence, offered in a different cause from the one in which it was passed, and cannot be impeached here. The fact that no evidence was offered to affect the infants, does not affect the decree so long as it remains unreversed. Error in the decree can only be shown by appeal or by bill of review. *Harris vs. Harris*, 6 G. & J. 111; *Comegys vs. State, use of Dykes*, 10 G. & J. 175; **340** 1 *Peters*, 328, 240.

The error here complained of arises from defect of proof, but want of proof does not affect jurisdiction; it may affect the judgment in the case, but not the power of the Court to decide the case made either way. Defect in proof is matter to be considered upon appeal. Besides, the infants after arrival at age might review this decree. Such is their right: but if they acquiesce in it, no other party can object, nor can they, so long as the decree remains.

W. Schley, for the appellee, admitted—that if jurisdiction existed, errors in the decree could not be reviewed collaterally. The objection is want of jurisdiction to transfer title. The question arises in an action of ejectment where the plaintiff must show title, which this record does not establish. This arises from the fact that some of the defendants were infants, and the case does not destroy their title. 1785, chap. 72, sec. 12, gives the power, and sales should be in pursuance of that Act. The plaintiff first proved title in the children, and he must proceed to show it out of them. Chancery has no original independent power to sell the real estate of infants.

The Court of equity is bound to examine the circumstances, and see that it has jurisdiction.

The case in 10 G. & J. 175, is independent of our legislation, and is not as contended, an express decision on the point at bar. It was the case of a non-resident infant defendant, and publication there was equivalent to proof. It gave jurisdiction as proof would give it.

BY THE COURT—

Judgment reversed, and procedendo awarded.

* **HENRY REPP, Senior, and others *vs.* HENRY REPP, Junior, 341**
and others.—June, 1842.

A father, seized of land, conveyed it in fee to one of his sons, but retained possession, and about a year after agreed with him in writing, under the seal of both parties, that the father should retain, use and cultivate the land at a nominal rent during his life, and if his widow survived him, she should retain part of the dwelling house, with a garden, for her life. The son agreed on his part, to execute bonds to his brothers and sisters for the payment of four-fifths of the value of the land, to become due after the decease of his father, being the balance of the whole purchase money. The son executed the bonds to his four brothers and sisters, and the father continued in possession from 1824 to 1838, the time of filing the bill, meanwhile the son became an insolvent debtor, and conveyed the land to trustees for the benefit of his creditors under the insolvent laws, among whom were various judgment creditors. The agreement between the father and son was neither acknowledged nor recorded, and pending a bill filed by the father, brothers and sisters, to prevent a sale of the land until their bonds were paid, the father died. *Held*, that a lien existed for the payment of the bonds out of the proceeds of the land, as against the son, his trustees and judgment and general creditors. (a)

APPEAL from the equity side of Frederick County Court. The bill in this cause was filed on the 26th September, 1838, by Henry Repp, Senior, Jacob Repp, Susanna Long, Henry Smeltzer, and others, and alleged, that on and prior to 16th May, 1823, Henry Repp, Senior, was seized and possessed of certain parcels of land, &c.; that being desirous to make such an arrangement for the benefit of his several children, as would secure to them after his decease the value of his said estate in equal shares, the said Henry Repp, Senior, the father, and Henry Repp, Junior, the son, as a means and mode of effecting the said arrangement, agreed, that the former should sell and convey to the latter, the said real estate hereinbefore described, at the price of \$60 per acre, to be paid for after the decease of the said Henry Repp, Senior, in instalments, except as to one-fifth part thereof, which was to be retained by the said Henry Repp, Junior, as his own share; and that the said Henry Repp, Senior, notwithstanding this said sale and conveyance, should be permitted to occupy and cultivate the said farm, with restrictions only as to the right to cut green timber; * except for fencing, repairs and fuel; and **342**
that after the decease of the said Henry Repp, Senior, the

(a) Approved in *Carson vs. Phelps*, 40 Md. 99; *Dyson vs. Simmons*, 48 Md. 217; *Hartsack vs. Russel*, 52 Md. 625; *Dixon vs. Dixon*, 1 Md. Ch. 221; *Spalding vs. Brent*, 3 Md. Ch. 417; *Ringgold vs. Bryan*, *Ibid*, 496. As to the enforcement of equitable mortgages against the contracting party and his creditors, see *Alexander vs. Ghiselin*, 5 Gill, 138.

said Henry Repp, Junior, should enter upon the said land, and hold the same subject to the payment of the purchase money, except as to one fifth-part as aforesaid; that in pursuance of such agreement, and in part performance thereof, the said H. R. Sr., on the 16th May, 1823, did convey to the said H. R. Jr., the said first mentioned three pieces or parcels of land, containing, &c., for the consideration of \$9,120, and that afterwards, to wit, on the 26th May, 1823, the said H. R. Sr., in further pursuance of said agreement, and in part performance of the same, did convey to the said H. R. Jr., his heirs and assigns, the other piece or parcel of land, containing, &c.; that at the time of the execution of said deeds the said agreement rested in parol, although the provisions and stipulations thereof were fully and distinctly understood, and that the said two conveyances were made and delivered by the said H. R. Senior, in pursuance and in part execution of the said agreement, and not otherwise; that afterwards, the said H. R. Junior, complained that the price at which he was to pay for the said lands was unreasonably high, and that he was not content and willing to keep and hold the said lands at the said price, and that the said H. R., Senior and Junior called upon one David Bowlus, an intelligent surveyor, and the person by whom the said conveyances had been prepared, and upon consultation with him, and in consideration of a contingent provision to be made for the wife of the said H. R. Senior, with whom he had intermarried since the execution and delivery of the said conveyances, the amount of purchase money was reduced to \$10,000, and it was then agreed as before, that of the sum of \$10,000, the said H. R. Junior should retain the sum of \$2,000, part thereof as his own share of the purchase money so rendered, and that he should pay as the residue of the purchase money, to the said other children severally, the sum of \$2,000 each, in his six equal annual instalments, the first of which instalments was to be paid at one year after the decease of the said H. R. Senior, and it was also at the same time agreed as before, that

343 * he, the said H. R. Senior, during his natural life, should have the right to cultivate said farms in every respect as he might think proper, with restrictions only as aforesaid as to the right to cut green timber; that it was further also agreed, that in case Christina Repp, the wife of H. R. Senior, should survive him, she should also, during her natural life, be permitted to occupy unmolested and undisturbed, the south-east lower room in the mansion house on said property, with a sufficient portion of the garden for her reasonable convenience; that the said Christina has since departed this life, leaving her husband; that the said David Bowlus was requested by both parties to prepare all the necessary legal instruments for carrying said agreement into full effect, so as to secure to each child his or her equal part, according to said agreement; that a series of bonds, dated 3d May, 1824, were accordingly prepared and executed by H. R. Junior, one set to Jacob Repp, one to Susanna Long, one to

Henry Smeltzer, and another series to Daniel Repp. The bill further stated, that the said D. B., at the same time, also prepared a certain agreement in writing, which was executed by the said R. Senior and Junior, and left in the hands of the said D. B. for safe-keeping, and in whose possession the same now remains, a copy whereof is herewith shown as a part of this bill; that since the execution of the aforesaid deeds, the said Henry Repp, Senior, has continued in the use and occupation of said lands, and is now in the use and occupation of the same.

The bill then further charged, that on the 3d March, 1838, the said H. R. Junior executed and delivered to Suratt D. Warfield and Jacob Fox, a certain deed of trust for the benefit of his creditors, which includes the real estate aforesaid; that the said trustees have offered said property for sale, and allege and pretend that they have good right and authority to sell the same, and invest the purchaser with an absolute title in fee simple, disburthened of the particular estate of Henry Repp, Senior, and free of any lien or claim of the complainants for the unpaid purchase money; that the said trustees had full notice of the agreement under which the conveyances were made by H. R. Senior to H. R. Junior.

*The bill then claimed that the bonds were a lien on the land, and that H. R. Senior was entitled to the use and occupation of the land, and that the written agreement in the hands of D. B. is apt and sufficient to create a trust and confidence arising from the execution of the deeds, and that the same will be enforced as well against his trustees, as the said H. R. Junior, and prayed that a trust might be declared, established and enforced, and that H. R. Senior might be quieted in his possession, and their liens established. Prayer for subpoena and general relief.

With the bill was exhibited—

1. Indenture of 16th May, 1823, from Henry Repp, Senior, to Henry Repp, Junior, consideration \$9,130, for a part of the land in the bill described.

2. Indenture of 26th May, 1823, from and to same, consideration \$6,000, for another portion of the land.

3. The agreement between the father and son, as follows:

Agreement made this 3d May, 1824, between Henry Repp, Junior, of, &c., of the one part, and Henry Repp, Senior, of, &c., of the other part. Witnesseth, that whereas the said Henry Repp, Senior, executed deeds of conveyance to the said Henry Repp, Junior, which are now duly recorded amongst the land records of Frederick County, for the quantity of 224 acres of land, more or less; and whereas, the said Henry Repp, Junior, executed sundry bonds to his brothers and sisters, bearing equal date with these presents for the payment of the said land, the amount of \$8,000, agreeably to the request of the said Henry Repp, Senior, all of which bonds becomes due after the decease of the said Henry Repp, Senior, said

bonds being the balance of the whole purchase money; and whereas, the said Henry Repp, Junior, hath this day rented unto the said Henry Repp, Senior, the aforesaid lands upon which the said Henry Repp now resides, situate, lying and being in the county aforesaid, containing about 224 acres of land, for and during the life-time of him the said Henry Repp, at and for the sum of five dollars, current money, per year, during the time aforesaid, which said sum of money he the said Henry Repp agrees to pay unto the said Henry Repp,

345 Junior, at the expiration * of each and every year the amount of five dollars as aforesaid; the said Henry Repp, Senior, may during his life cultivate the said farm or farms, lands aforesaid, in every respect as he may think proper, during his life as aforesaid, under this express proviso and restriction, however, that he the said Henry Repp, Senior, shall not be allowed to cut or destroy any green timber on the said land, more than is necessary in repairing the fencing on the land, or other improvements which may be made thereon, and his fire-wood; and it is further agreed, that in consequence of the said Henry Repp, Senior, having sold the aforesaid land to the said Henry Repp, Junior, at a moderate price, he the said Henry Repp, Junior, doth hereby agree, that if in case Christiana Repp, wife of the said Henry Repp, Senior, should survive him the said Henry Repp, Senior, that she the said Christiana shall and may during her life, undisturbed and unmolested, occupy the south-east lower room, in the mansion house in which the said Henry Repp, Senior, now resides, situated on the within mentioned land, together also with a sufficient spot of ground in the garden as may be deemed necessary for her to have as garden. In due performance of this agreement, the parties hereunto bind themselves, each to the other, their heirs, executors or administrators, in the penal sum of five thousand dollars, current money.

In testimony whereof, the parties have hereunto set their hands and seals, the day and year first hereinbefore written. Possession is given from this date, 3d May, 1824. HENRY REPP, [Seal.]

HENRY REPP, [Seal.]

Signed, sealed and delivered in the presence of us,

John Dill, David Bowlus.

I do hereby certify, that the above and foregoing is a true copy left in my possession for safe-keeping. DAVID BOWLUS.

February 26th, 1834.

4. Deed of trust of 3d March, 1838, from H. R., Junior, to Snratt D. Warfield and Jacob Fox, reciting that H. R., Jr., was an applicant for the benefit of the insolvent laws, and that the **346** * grantees had been appointed his trustees, conveyed all his property for the benefit of his creditors generally.

5. Various bonds of H. R., Junior, for the payment of money of the 3d May, 1824, to his brothers and sisters, were also filed with the bill.

The answer of Henry Repp, Junior, admitted the seizin of his father, and the execution of the two deeds of the 16th and 26th May, 1823, but denies at the time he purchased said lands or prior thereto, there was any agreement between him and his father, that the said defendant should pay for the said lands after the decease of H. R., Senior, by instalments, &c., and also denies that there was any agreement prior to or on the 16th May, 1823, that H. R., Senior, should be permitted to occupy and cultivate said lands, or that after his father's decease, should the same subject to the payment of the instalments; and also denied that H. R., Senior, in pursuance of any such agreement did convey to the said defendant the said lands in part performance; that if there ever was as stated in said bill the agreement therein set forth, as above denied, resting in parol, there was never any part performance thereof. The answer then relied upon the Statute of Frauds, and alleged that at the time he contracted for the said lands the purchase money was to be paid to H. R., Senior, and to no other person; that defendant bought the said lands as he would of any other person, and considered himself as a debtor to H. R., Senior, and no other person, and that no direction was at that time given to pay the purchase money to his other children. The defendant further alleged, that the agreement between him and H. R., Senior, other than the contract of purchase, as contained in the deeds, is the agreement of 3d May, 1824, a true copy of which is filed with the bill. The answer then denied that instructions were given by H. R., Senior and Junior, to D. B., to draw an instrument different from the one thus exhibited, and that if any other exists, it is not in writing and is void in the absence of fraud or mistake. The answer admitted the execution of the bonds and the use, possession and enjoyment of the land by H. R., Senior, and objected that the agreement * of 3d May, 1824, was not acknowledged nor recorded, and therefore inoperative to pass a free- **347** hold; and then admitted the deed to Warfield and Fox, and their attempt to sell the land, but denied that the bonds were a lien on the land in the hands of his said trustees or those purchasing from them. The answer also denied that there was any agreement between him and his father or brothers and sisters, that the said bonds should be iens, but that he held a free and unincumbered estate in the land; that he was forced to apply for relief under the insolvent laws, and there are many judgments against him now unpaid. The defendant also answered that it was true the bonds were given in consideration of the whole purchase money, which remains to be paid.

The answer of Warfield and Fox, the trustees, &c., took substantially the same grounds of defence as that of their co-defendant.

The general replication was filed, and a commission issued to take proof.

Under the commission, the draftsman of the agreement was examined, who proved that he drew the deed of 16th May, 1823, but it was not executed in his presence; that when the parties, the father and son came before him to execute the agreement of 3rd May, 1824, they had not agreed upon the amount of the purchase money, but ultimately, in consideration of H. R. Junior, contending that the land did not hold out as stated in the two deeds of 1823, and in consideration of the provision for Mrs. C. Repp, the price was reduced from a sum not recollected, to \$10,000, and that no part of the consideration had been paid at that time. The same witness proved the bonds, and the object of giving them, viz: to secure four-fifths of the purchase money; and that the agreement and bonds contained and carry out the views and purposes of the parties, and that he had no knowledge of any other agreement. There was some other proof not deemed material, as the facts are admitted in the answers. Proof of various judgments against H. R., Junior, rendered in 1836, 1837 and 1838, was also filed, with the record of his application for relief under the insolvent law.

348 * The case was submitted for final decree, waiving all matters of form and want of parties, agreeing that the land had been sold for \$10,710, and that the bond-holders should have the same remedy and rights against the proceeds as the land itself, and the County Court, [A. SHRIVER, A. J.,] by consent, dismissed the bill *pro forma* on the 22nd July, 1841, when the complainants appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Palmer, for the appellant—After adverting to the facts, maintained, that a deed to take effect *in futuro*, was not a deed of bargain and sale, but a covenant to stand seized until the future day comes. The agreement of 1824, under hand and seal, worked that result upon the deeds of 1823, as respects Repp, Junior, and those claiming under him, and also left the merits open on this argument.

As a general rule, the vendor has a lien for purchase money. What are the exceptions to that rule? Upon what are they founded? Are the children of Repp, Senior, entitled to that lien? The bonds were not given to the vendor, but to those children? The father intended the children should have the land. This is the same here as a conveyance to them. The vendee must pay the purchase money before he gets clear of the lien. The lien exists in equity, and there the land is the vendor's until paid for. It is against conscience to take and not to pay. The vendee is a trustee for the vendor until payment. This is so in part or in the whole. If the property is sold by the vendee and not paid for, the purchaser may be affected by this lien for the sum due the vendor. Payment to the vendee, by a purchaser after notice of such lien, would not discharge the vendor's

right. 2 *Sto. Eq.* 462, 464. Liens generally arise from constructive trusts—as contracts to convey. Trusts raised by implication of law are not within the Statute of Frauds. If the vendor agrees to trust the personal credit of the buyer, this is an exception, and a waiver of the lien. *Ib.* 470. The burthen of proof of displacing a lien is *on the purchaser. If doubtful the lien attaches. *Ib.* 471. Taking a security is only a presumption of waiver under cir- **349**
 cumstances, that is, a security independent of the purchaser, yet this only shifts the burthen of proof. 1 *Simon and Stuart*, 434.

Then a purchaser with notice is affected before purchase money paid. 2 *Sto. Eq.* 483. By the agreement of May, 1834, the purchase money was to be paid to the brothers and sisters, and at the father's death. The money belonged to the children. There was a privity of contract in equity. It was a family arrangement. In equity it is the father's land, hence his children, owners of the purchase money, have the same equity. Such is the reason and common sense of the thing, and there is no reason why the lien does not exist.

It is supposed the children are third parties and not entitled to the lien. The case of 7 *Wheaton*, 46, presented that question, but it was not decided. The case of 3 *Atk.* 272, and 2 *P. Wms.* 291, are at the base of the opinion, that a lien will not pass to third persons, but they are overruled. It has been extended to legatees and assignees. In 4 *H. & J.* 522, it was awarded to a third party. So where a security pays the debt, the law assigns the lien as an incident of the debt. The lien may be transferred by contract. The cases relied on against the right are overruled by 15 *Ves.* 345; 9 *Ves.* 209; 4 *Russ.* 423; 8 *Simons*, 189. In favor of the assignees of the father, the children, and to show the lien passes to them, the counsel cited—2 *Burr.* 969; 2 *Gallison*, 155; 4 *Pick.* 131; 5 *Cow.* 202; 1 *John.* 581; 3 *John. Cases*, 322; 11 *John.* 598; 7 *G. & J.* 120; 2 *Am. Eq. Dig.* 515; 4 *Littell*, 289; 5 *Munroe*, 287; *Yorger*, 84; 4 *Dana*, 1834; 3 *Simon*, 499.

Judge Story, in his *Commentaries on Equity*, 2 vol. 483, sec. 1233, is in error in citing 3 *Sim.* 499, as showing that third persons, to whom a part of the purchase money is to be paid, stand in no privity to establish a lien; that case decides a contrary doctrine, at least, does not decide the question of lien against the assignee.

Again, if the children here have a lien at all, they are in
 *before the trustee and judgment creditors. The Act of **350**
 1805, ch. 110, sec. 5, only relates to the insolvent's funds and the mode of their distribution, and provision is made for judgments, liens and incumbrances; it does not disturb the general law, and assignees under deeds of trust take the thing conveyed, subject to all the equities which exist at the date of their deeds. 2 *Sto. Eq.* 481; 2 *Sug. on V.* 82, 74; 6 *Ves. n, a*, 95, collects all the cases on this head. 34 *Law Lib.* 327; 12 *Ves.* 346; 2 *Ves. & Bea.* 309; 2 *Ed. Rep.* 505; 1 *Serg.* 513.

Is a judgment against Repp, Junior, before his application under the insolvent law, a preferred lien to our claim. A judgment is a general lien, contracts are specific liens. A judgment binds what the defendant had. It gives no interest. It is but an authority to sell, a bare authority to convert the property, so that it ought not to prevail over a specific right. 2 *H. & J.* 64; 1 *P. Wms.* 278; 1 *Paige*, 125.

The possession of Repp, Senior, is sufficient to put all parties upon enquiry. It was notice at the time of the judgments rendered to the trustee. A secret equity cannot be set up against a judgment. But this is not a latent equity so long as the father remained in open use and occupation, which is notice. 10 *G. & J.* 324; 16 *Ves.* 220; 1 *Sto. Eq.* 388.

There is a trust of some kind for the benefit of the children, the bond-holders. The deed is not in fact what it purports in fact to be. It is contradicted by the fact which shows a family settlement, that ought to be enforced upon the death of the father, and denies that all the estate should be given to Repp, Junior. The agreement of the 3d May. The bonds and possession of the father demonstrate the transaction, and let in the parol proof to explain doubtful parts, not to create the trust, but merely to mark its character. Thus the case is not within the Statute of Frauds. *Willis on Trust*, 20, 21. Any form of writing admitting the existence of a trust, lets in parol proof to show its character and nature. The recitals of the agreement of 3rd May bring this cause within that principle. 4 *Bro. C. R.* 472; 1 *Wash. Va.* 14, 17; 4 *Russ.* 423; 7 *G. & J.* 163; 1 *John. C. R.* 128.

351 *The answer is overruled by slight circumstances. *Gresly Evid.* 4; 9 *Ves.* 584; 1 *Paige*, 209; 1 *Edw. Rep.* 442.

Brengle and T. C. Worthington, for the appellees: 1. The lien of the vendor for the purchase money of land, after a conveyance duly acknowledged and recorded, will not prevail against the judgment creditors of the vendee, claiming under the deed of trust of such vendee, under the Act of 1805, ch. 110, and its supplements; such judgments being rendered prior to the application of said debtor for the benefit of the said insolvent laws, for debts contracted subsequent to said conveyance, and without notice of the said lien. 2 *Ves. & B.* 149; 2 *Serg. Ven.* 83, 75; 2 *Ves. & Be.* 83; 12 *Ves.* 192.

2. The lien of the vendor was extinguished or waived by the agreement, marked Exhibit C, and the bonds for the purchase money executed to third persons by direction of vendor. 1 *Paige*, 20.

3. The lien of the vendor is confined to him, and his personal representatives, after his death, and is not assignable; but if assignable, the assignment must be in writing, and cannot be established by parol in favor of the assignee. 1 *Bland*, 519, 522; *Ambler*, 724.

4. If the bonds are tantamount to an assignment of the purchase money, they contain no guarantee on the part of the assignor, for

the payment thereof; and the assignee having no recourse against the assignor, cannot assert through him, the lien of the vendor for the purchase money.

The obligees are assignees of the debt and not of the lien. The vendor directed the purchase money to be paid to them. The debt existed eleven months before the execution of the bonds. Then they are only an assignment of so much of the purchase money. 1 *Paige*, 501; 2 *Sto. Eq.* 428, No. 2; 4 *H. & J.* 522; 2 *H. & J.* 89, 87; 2 *H. & J.* 508; 5 *H. & J.* 42; 10 *Ohio Rep.* 318; 7 *G. & J.* 120.

*5. The obligees in said bonds claim as donees under the vendor, and can only claim as such obligees; or in other **352** words, as bond creditors of the vendee, and as such they cannot come in competition with the judgment creditors of the said vendee, under the said insolvent laws.

6. That there is no trust arising by construction or implication of law, and that there is no express trust sufficiently created or made.

7. That the said bonds are not a lien as against the said trustees of H. Repp, Junior, nor as against creditors generally.

BY THE COURT—

This Court being of opinion that a lien for the balance of the purchase money on the land conveyed by Henry Repp, Senior, to Henry Repp, Junior, for the amount of the bonds of said Henry Repp, Junior, (principal and interest,) in favor of his four brothers and sisters, is established, as well against the said Henry Repp, Junior, his judgment and general creditors, and all the defendants in this cause, to be paid out of the proceeds of the said land, do hereby reverse the decree of Frederick County Court, with costs, and order that this cause be remanded to said Court as a Court of equity, for the purpose of taking an account, and that the rights of the complainants may be ascertained and decreed upon in severalty, according to the principles and terms of this decree, and their equity in the premises. *Decree reversed with costs, and cause remanded.*

BUCHANAN, C. J., dissented.

* WILLIAM H. WASHINGTON vs. THOMAS HODGSKIN, **353**
Garnishee of J. T. BOTELER.—December, 1842.

The Act of November, 1795, chap. 56, directing the manner of suing out attachments against absent debtors, in its 2nd section enacts, that the oath or affirmation of a creditor made as aforesaid, before a Judge of any other of the United States, (than Maryland,) shall not be good and sufficient evidence, unless there be thereto annexed a certificate of the clerk of the Court of which he is Judge, or of the Governor, Chief Magistrate or Notary Public of such State, that the said Judge hath

authority to administer such oath or affirmation. *Held*, that a literal compliance with the law in relation to the certificate was not required, and where the Governor of a State certified that the Judge before whom the affidavit of debt was made, was a Judge, that his attestation is in due form of law, made by the proper officer, and full faith and credit are due to all his official acts; this was deemed a substantial compliance with the Act of 1795, and sufficient. (a)

In determining the sufficiency of the Governor's certificate in such cases, it will be construed in connexion with the affidavit to which it is appended, with a view to show that the particular facts demanded by the Act of 1795, really exist in the case made by the documentary proof.

The appeal in this case was properly taken from the judgment quashing the attachment, and not from the refusal of the Court to strike out the judgment. (b)

APPEAL from Prince George's County Court. This was an attachment cause, commenced on the 22nd June, 1841, upon the following proofs:

THE STATE OF MISSISSIPPI, Hinds County, *set*:

Be it remembered, that on this 2nd of June, 1841, personally appears before me, Isaac R. Nicholson, one of the Judges of the Circuit Court of the State of Mississippi, fully commissioned and qualified as such, William H. Washington, a resident and citizen of said State, and made oath on the Holy Evangely of Almighty God, that John T. Boteler is *bona fide* indebted to him, the said William H. Washington, in the sum of \$2,206, on a promissory note, over and above all discounts; and the said William H. Washington at the same time produces the said promissory note, dated Madisonville, October 21st, 1837, made by said Boteler to the said Washington, for the sum of \$1,821.06, due one day after date, with two credits thereon, the first, May 18th, 1838, for \$31.75, the second, **354** * October 22nd, 1838, for \$26: said note is hereunto annexed, by which the said Boteler is so indebted. And the said Washington also makes oath, that he is credibly informed and verily believes, that the said John T. Boteler is not a citizen of the State of Maryland, and does not reside therein.

WILLIAM H. WASHINGTON.

Sworn to before me, this 2nd June, 1841.

I. R. NICHOLSON, Judge, &c.

(a) Approved in *Case vs. McGee*, 8 Md. 15; *Evesson vs. Selby*, 32 Md. 346. Substance, and not form, is to control the construction of legislative enactments prescribing a mode in which acts are to be done. *Young vs. State*, 7 G. & J. 183.

(b) Cited in *Cushwa vs. Cushwa*, 9 Gill, 247; *Hall vs. Holmes*, 30 Md. 560. An appeal lies from an order overruling a motion to strike out a judgment, whether the motion be made during the same term or at a subsequent term. *Hall vs. Holmes*.

Copy of the note annexed :

"\$1,821.06.

Madisonville, Oct. 21st, 1837.

"One day after date I promise to pay William H. Washington, or order, the sum of one thousand eight hundred and twenty-one dollars and six cents, for value received. JOHN T. BOTELEB."

On the back of which note is thus endorsed, to wit :

Received on the within note \$31.75, 18th May, 1838. Credit the within by this amount, \$26, October 22nd, 1838.

By ALEXANDER G. McNUTT,

Governor of the State of Mississippi :

To all who shall see these presents, greeting : Be it known that Isaac B. Nicholson, whose name is subscribed to the annexed certificate, was, the 2nd day of June, A. D. 1841, Judge of the Circuit Court in the 7th Judicial District in the State of Mississippi; that his attestation to the annexed certificate is in due form of law, and made by the proper officer, and that full faith and credit are due to all his official acts.

In testimony whereof, I have caused the Great Seal of the State to be hereunto affixed. Given under my hand, at the City of Jackson, this 2nd day of June, A. D. 1841.

A. G. McNUTT.

Thomas B. Woodward, Secretary of State.

Upon these documents a warrant against the goods, &c. of J. T. B. was directed by a justice of the peace, and an attachment issued with a *capias* and short note as usual. The attachment was levied upon J. T. B.'s interest in several tracts of land, and so returned with a schedule, the sheriff * certifying the lands to be in his possession. The *capias* was returned *non est*. **355**

At the return term of the writ of attachment and *capias*, and after the defendant had been called, the plaintiff moved for a judgment of condemnation, and Thomas Hodgskin prayed leave that he might appear as garnishee of J. T. B., without bail, to defend the action. The garnishee was permitted to appear, and the motion for a judgment overruled. The garnishee appeared, and moved the County Court to quash the attachment.

1st. Because it appears from the cause of action itself produced, and filed with the affidavit made by the plaintiff in this cause, on which the attachment was issued, that the amount stated in said affidavit as due to the plaintiff, is not due, but another and a different sum, if there be any amount due.

2d. Because the certificate of the Governor of Mississippi does not state or set forth, that the Judge before whom the oath was made was authorized, or had any authority to administer such oath.

The Court quashed the attachment.

At the same term the plaintiff moved for a re-hearing, and that the judgment be struck out, which motion the Court overruled, and

the plaintiff prayed an appeal from the judgment of the Court here so as aforesaid rendered.

The cause was argued before STEPHEN, DORSEY, and CHAMBERS, JJ.

C. C. Magruder, for the appellant. *T. F. Bowie*, for the appellee.

STEPHEN, J. delivered the opinion of this Court. The appeal in this case was, we think, properly taken from the judgment of the Court below, quashing the attachment, and not from the refusal of the Court to grant a re-hearing. There is but one question in the case, which it is necessary to decide, and that relates to the sufficiency of the Governor's certificate, as to the power of the Judge to administer the oath, * which was taken before him by the attaching creditor. The Judge, after stating that the oath was taken before him, attaches to the foot of his certificate the following attestation: "Sworn to before me, this 2d June, 1841. I. R. Nicholson, Judge, &c." The Governor certified that he was a Judge of the State of Mississippi on that day, and "that his attestation to the annexed certificate is in due form of law, and made by the proper officer, and that full faith and credit are due to all his official acts." The Act of 1795, chap. 56, sec. 2, provides, that the oath shall not be good and sufficient evidence when made before a Judge of any other of the United States, unless there be thereto annexed a certificate of the clerk of the Court of which he is a Judge, or certificate of the Governor, Chief Magistrate or Notary Public of such State, "that the said Judge hath authority to administer such oath." The question therefore is, whether the certificate of the Governor has substantially complied with the requisition of the Act of Assembly, as to the capacity of the Judge to administer the oath in this case; for it is not understood that a literal compliance with the law is necessary, if the certificate is substantially sufficient, the case of *Shivers vs. Wilson*, in 5 *H. & J. Rep.* 130, having decided that a substantial conformity to the requirements of the law, is all that is necessary. A few years after the passage of the Act of Assembly under which this proceeding was had, a similar question arose before the late General Court, and was decided by that tribunal; it occurred in the year seventeen hundred and ninety-nine, very recently after the passage of the law, and before a Court of acknowledged legal learning and ability. In that case the Court, speaking of the Governor's certificate, say, "it does appear to the Court that the certificate is sufficient. The Governor certifies to the affidavit of the justice of the Court of Common Pleas, that full faith and credit is to be given to his attestation." He has attested that Smith was sworn, and this shows that he could administer an oath. 4 *H. & McH. Rep.* 294. The certificate in the case now before this Court, seems to be of equivalent import, and entitled to the same construction.

The Governor certifies that *the Judge's attestation to his certificate, is in due form of law, and made by the proper officer, and that full faith and credit are due to all his official acts. The Judge attests and certifies that he administered the oath; that the attaching creditor was sworn by him, and the Governor certifies that the attestation or certificate of the Judge, stating that the oath was administered by him, was made by the proper officer. The inference seems to be not only fair, but irresistible, that if he was the proper officer to make such a certificate, he must have had authority to administer the oath; for if he had not the power to administer the oath, which he states he did administer, his certificate that he did administer it, could not be said, with propriety, to have been made by the proper officer. He was not the proper officer to certify the fact. Instead of being an official act, or one appertaining to his office, to which full faith and credit ought to be given, it would have been an illicit and unwarrantable usurpation of power. The case in 4 H. & J. 192, referred to in the argument, does not, when properly considered, conflict with this view of the question. The clerk in that case only certified that he was a Judge, "and that full faith and credit ought to be given to his legal attestations in Court, and not in his said capacity," but as was argued by the counsel, he did not certify that the particular act in question was a legal one, to which full faith and credit ought to be given, if he had the certificate would have been full and sufficient, and have been sustained by the case decided in 4 H. & McH., 294, above referred to. The Court, in 4 H. & J. 192, do not require the certificate to state in express terms, that the Judge had authority to administer an oath; they only say, that as it did not appear by the certificate of the clerk, that the Judge had authority to administer an oath, the proceedings were defective. Considering the certificate of the Governor in this case, as to the power of the Judge to administer an oath to be sufficient, we think that there was error in the judgment of the Court below, quashing the attachment upon that ground, and that the same ought to be reversed.

Judgment reversed, and procedendo ordered.

*GEORGE SEMMES, use of JAMES BADEN vs. JAMES NAYLOR of ISAAC, Survivor of CHARLES L. BOTELER. 358
December, 1842.

Defences arising after the commencement of an action, should be pleaded *puis darrein continuance*, or against the further maintenance of the suit.
(a)

G. was the deputy sheriff of S. and gave bond with B. as his surety, both were sued to judgment; after this, G. with J. as his surety, gave an injunction bond, and procured an injunction to stay proceedings upon

the judgment against him. His bill was finally dismissed. In an action upon the injunction bond entered for the use of B. against J. the surety, who pleaded that G. had prosecuted his injunction with effect, and performed all he was bound to do by the condition of that bond; it appeared that B. the equitable plaintiff, had paid off the judgment against him, part before and part after the commencement of the action against J. *Held*, that under the state of the pleadings, the defendant J. could not give in evidence the payment by B. made after the commencement of this action, and that B. by virtue of his payment of the original judgment against him, was not entitled to an assignment from S. of the injunction bond, so as to enable him to proceed against J. The principles of contribution between co-sureties do not apply to such a case. (b)

The surety in the first bond would be entitled on the ground of substitution, to the benefit of any lien upon his own property, either real or personal, which the principal debtor might give to the creditor, as a security for the payment of his debt, or as the means of re-imbursement and indemnity against loss, if in his character of surety he should be compelled to satisfy such debt, and that, no matter when the lien was created.

APPEAL from Prince George's County Court. This was an action of debt, commenced on the 3d January, 1839, by the appellant against James Naylor of George, and James Naylor of Isaac, surviving obligors of Charles L. Boteler. The plaintiffs declared upon a bond of the defendants for \$1,000, dated 4th December, 1827, payable when thereunto required.

The bond was exhibited with the *narr.* and contained a condition, reciting that James Naylor of George had obtained an injunction out of P. G. County Court, upon a judgment therein rendered in favor of George Semmes, for \$474.27 damages, \$16.43 costs, and that the said J. N. of G. would prosecute his injunction with effect, and satisfy and pay the said G. S. as awarded, &c. The appellee only **359** was arrested, and he pleaded *general performance. The plaintiff replied that the injunction had been discontinued and dissolved, and the bill on which it was granted struck off and discontinued, and he not satisfied or paid his judgment. The defendant rejoined, that J. N. of George, did prosecute his said writ of injunction with effect, and did perform all he was bound to do according to the condition, &c., on which issue was joined. The jury found for the defendant.

At the trial of this cause, which was commenced without the entry of any use, the plaintiff to maintain the issues joined on his part, read to the jury the bond upon which the action was brought, and the record of the judgment at law recited in the said bond. He also proved by the production of the record of the proceedings upon the equity side of the said County Court, that the bill filed by the

(a) Approved in *Bank of U. S. vs. Merchants Bank*, 7 Gill, 428.

(b) Approved in *Smith vs. Anderson*, 18 Md. 527. See *Sotheren vs. Reed*, 4 H. & J. 246, note (a).

said James Naylor of George, had been dismissed with costs by the said Court as a Court of equity, at January Term, 1830, as stated in the plaintiff's replication, and there rested his case.

The defendant thereupon, to maintain the issues joined on his part, offered to prove to the jury by competent evidence, that James Baden, for whose use this suit is now entered and prosecuted, was one of the sureties of the said James Naylor of George, in a bond given by him to the legal plaintiff in this action, as his deputy, he, the said legal plaintiff, being then the high sheriff of Prince George's County; and that at October Term, 1827, judgment was rendered against him as principal in said bond, in favor of the said legal plaintiff. And the defendant further proposed to prove by competent evidence, that a judgment was rendered at the same time in favor of the said plaintiff against James Baden, the *cestui que use*, of this action on the same bond, and for the same debt; and the defendant further offered to prove by competent evidence, that the judgment against the said James Naylor of George was taken by him to the Court of Appeals, on exceptions filed, and that two appeal bonds were filed by him, one dated October 18th, 1827, and the other November 15th, 1827, and the said James Baden was one of the sureties therein, and that the * judgment against said James Baden was entered to abide the decision by the Court of Appeals of the case against Naylor of George. And the defendant further offered to prove by like evidence, that the bond upon which this action was brought, was given by the said James Naylor of George, upon filing a bill for an injunction to stay proceedings upon the said judgment, so rendered against him at October Term, 1827, and affirmed by the Court of Appeals in favor of the said George Semmes; and then offered to prove, that James Baden, who was the surety of the said James Naylor of George, in the bond given by him as deputy sheriff as aforesaid, paid part of the said judgment rendered against him, before this suit was brought, and that he paid the balance of the judgment against himself soon thereafter, and no assignment was ever made, or any use entered of the judgment against said James Naylor of George for James Baden. But the plaintiff, by his counsel, objected to the evidence, first, upon the ground that the same was not admissible under the pleadings in this cause, and secondly, because the said payment of the said judgment against himself by James Baden, the *cestui que use* of this suit entitled him to an assignment of the debt from the creditor, George Semmes, together with all the liens and remedies held by him for the security of the same, including the bond sued on in this action. The Court, however, overruled both said objections, being of opinion that the evidence so offered by the defendant was admissible under the pleadings, and that if the jury should find from the said evidence that the judgment against the said James Baden, as surety for the said James Naylor of George, was paid as aforesaid by the said

James Baden, such payment gave him no right of action against, or to an assignment of the creditor's claim on the bond on which this suit is brought, and that in such case their verdict must be for the defendant. To both of which opinions and judgments of the Court, [CLEMENT DORSEY, A. J.] the plaintiff excepted; and the verdict and judgment being against him, he prosecuted this appeal.

361 *The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

J. Johnson, for the appellant. *Pratt and Tuck*, for the appellee.

STEPHEN, J. delivered the opinion of this Court. Under the pleadings in this cause, the Court below were clearly wrong in admitting the evidence of the payment made by Baden, after the suit was instituted. Defences arising after the commencement of the action, should be pleaded *puis darrein continuance*, or against the further maintenance of the suit. *Agnew vs. The Bank of Gettysburg*, 2 H. & G. 478. "The rule is, that where matter of defence has arisen after the commencement of the suit, it cannot be pleaded in bar of the action generally; but must, when it has arisen before plea or continuance, be pleaded as to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrein continuance*." See the authorities referred to in 2 *Kinne's Law Com.* 476.

The other question decided by the Court below was, we think, correctly adjudicated. Upon principles of reason, as well as of sound law, the payment made by Baden to Semmes, as the surety of Naylor, in his official bond as deputy sheriff, did not entitle him to an assignment of the injunction bond upon which that action had been instituted. The bond was given to Semmes by Naylor, long after Baden had contracted his responsibility as the surety of Naylor, and could have constituted no inducement to his assumption of such liability, as the means of indemnity against loss. The principles of justice and equity, upon which the doctrine of contribution between co-sureties is founded, do not seem to apply to such a case. Their claim certainly has its foundation in the clearest principles, not only of law, but of morals. For where all are equally bound by a common burthen, and are equally relieved, justice demands that all should contribute in proportion towards a benefit obtained by all, upon the rule of equity, *qui sentit *commodum, sentire debet et onus*.

362 The doctrine held by the Court below seems to be countenanced and sustained by the reasoning of this Court in several cases, the decisions in which, involved principles strongly applicable to the present controversy. In the case of *Hollingsworth vs. Floyd*, reported in 2 H. & G. 87, judgments were obtained against principal and surety, and the debt was paid by the surety; to reimburse to him such payment, an execution was issued upon the supersedeas judgment of the principal, against him and his sureties; in that

case, this Court (when speaking in reference to the liability of the sureties in the supersedeas judgment, to refund to the surety in the bond upon which the judgments were obtained, the money paid by him for his principal,) held the following language: "The process was moreover issued upon the supersedeas judgment against Joseph P. Floyd, and his superseders, Henry Abell and Edward Spalding, Jun'r, on whom William Floyd, in justice, could have no claim. If he had satisfied the whole debt, we should have said he was entitled equitably to an assignment of the judgment against his principal, and all liens which the principal had given to the creditor; but beyond this we should have been indisposed to have gone. We could not have rendered other persons liable to William Floyd, whose responsibility was in no sort contemplated, when he entered surety for his principal." In 5 *H. & J. Rep.* 241, speaking in reference to the liability of bail to reimburse to a surety money paid for his principal, for whom the bail had become bound, this Court express themselves in terms of similar import. It is there said, "what equity has the surety, who became bound with his principal, to look to the bail of the latter, and who were not fixed at the date of the assignment for his indemnity? Their engagements were not contemporaneous or of the same nature. The undertaking of the surety was long prior in point of time to that of the bail, and the extent and nature of their obligations were essentially different." "The surety, when he became bound for the principal, looked to him, and such fixed securities as he had given to the creditor for his indemnity, and to permit him to proceed against the * bail, who were not fixed at the time of the assignment, would be contrary to **363** the first principles of justice." This was the case of an appeal from Chancery, and the decision of the Court in reference to the liability of bail was governed exclusively by the general principles of equity, without regard to any remedy or responsibility in this State, created by statutory enactment. The principle is well settled, that where the surety pays off a debt, he is entitled to have from the creditor an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion. In 1 *John. C. Rep.* 413, Chancellor Kent says, "if the creditor to a bond exacts the whole of his demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the co-sureties;" and in 1 *Story's Equity*, 474, it is said, "it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally, or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if they are for the same identical debt." In the same book at page 477, the principle is stated to be that, "if there should be separate bonds given with different sureties, and one bond is intended to be subsidiary to, and a security for the other, in case of a default in

payment of the latter, and not a primary concurrent security; in such a case, the sureties in the second bond would not be compellable to aid those in the first bond by any contribution."

In the 1st vol. of the *Law Library*, 160, it is said, that "the right to contribution exists between all sureties of the same degree, whether they are engaged jointly or severally, and if severally, whether they are engaged all in one instrument, or in several instruments, and whether they have a knowledge of one another's engagements or not; because in all these different cases, a payment by one surety is equally a benefit to all the other sureties." All these cases it is to be observed, speak of the sureties as being co-sureties; also as being sureties of the same degree, and bound for the same identical debt, by an obligation at least concurrent in its character

364 * and effect, if not known to the surety claiming contribution at the time his responsibility was contracted. The only case having a different bearing and recognizing a different principle, is the case of *Parsons vs. Bridgdon*, 2 *Vernon*, 608; and that case, this Court say in 5 *H. & J.* 242, "has pushed the doctrine of substitution to its utmost verge." There the principal had given bail in an action; judgment was recovered against the bail; afterwards the surety was called upon and paid, and it was held, "that he was entitled to an assignment of the judgment against the bail." That case was decided on the ground, that the bail stood in the place of their principal, and could not be relieved on other terms, than on payment of principal and interest and costs; and standing in the shoes of the principal, who would have been responsible to the surety, it was a necessary consequence of that relation, that they should be subject to a similar liability. But in this case, where the same reason for responsibility does not exist to make the sureties in the last bond responsible to the sureties in the first, for the purpose of re-imbursement and indemnity, would be to reverse the general rule regulating the order of liability in analogous cases, without, as it seems to us, any valid and sufficient ground to justify the establishment of such a principle. At the same time, however, that we hold the surety in the last bond not responsible to the surety in the first, we are clearly and decidedly of opinion that the surety in the first bond would be entitled on the ground of substitution to the benefit of any lien upon his own property, either real or personal, which the principal might give to the creditor as security for the payment of his debt, as the means of re-imbursement and indemnity against loss, if in his character of surety, he should be compelled to satisfy such debt. Of his rightful claim to the benefit of such a lien, in that event, we think there can be no doubt, and his title would be equally valid, whether its existence was prior, contemporaneous, or subsequent to the time of his suretyship.

The judgment of the Court below, for the reasons herein stated, must, however, be reversed, but no procedendo will be ordered.

Judgment reversed.

*CLARISSA GARDINER and WILLIAM F. BOWLING vs.
 RICHARD B. HARDEY and EDWARD SIMMS.—Decem- **365**
 ber, 1842.

B. and G. as executor and executrix of the deceased husband of G. were sued at law upon a claim passed by the Orphans' Court. B. was returned *cepi*, and confessed judgment in 1835. G. was returned *non est*.—was arrested on the renewal of the writ, and also confessed judgment in 1836, ignorant of any defence to the action. In 1837, after she had been informed by her co-executor, who had possession of her husband's papers, and after it was too late to move for a new trial, that he had searched her husband's papers, and that no receipt could be found, she determined upon a search herself, and discovered a receipt for the money claimed of her, given nine years before the action at law was instituted. Upon a bill filed to obtain relief, the fact of the receipt being admitted by the answer, and no proof taken to avoid it: *Held*, that the judgments against both executors should be stricken out, and the action brought forward by regular continuances for trial. (a)

Where a witness is excepted to in the Court of Chancery, as incompetent, on the ground of interest—as being a defendant to the bill, and as the legal plaintiff in an action at law sought to be enjoined, the Court will consider the admissibility of the witness under the circumstances, and not the sufficiency of the objections assigned.

How far can the answer of a co-defendant, the legal plaintiff in an action sought to be enjoined, but who has no interest in the controversy, responsive to the bill, he relied on as evidence for the other defendant, the real party in interest? *Qr.* (b)

Where a defendant answers the interrogative part of a bill, fully and distinctly, as put to him, and then proceeds to allege a variety of facts, not required of the bill, nor of which he had been interrogated, to do away the effect of his previous answer, such facts constitute matters of avoidance.

Facts in an answer not responsive to the bill, nor sustained by proof, at the final hearing of the cause are entitled to no consideration.

When a defendant, executrix, at law had confessed judgment, and sought to set it aside in equity, for the purpose of obtaining a new trial, on the ground of subsequent discovery of a receipt for the money claimed, the denial on oath of all previous knowledge of the existence of the receipt,

(a) Equity will not restrain the execution of a judgment unless it appear that the applicant for the injunction had a valid defence of which he could not have availed himself at law, or of which he could have availed himself, but was prevented from doing so by mistake, surprise, or fraud, unmixed with any fault or negligence of his own. *Hill vs. Reifsnider*, 46 Md. 555. In *Tabler vs. Castle*, 12 Md. 144, where the facts showed that there was a misapprehension on the part of a defendant, which prevented him from appearing and defending an equity suit, it was held that he was entitled to relief. In all cases of mistake, equity requires the injured party to seek relief promptly; and if he has been guilty of laches his complaint will not be listened to. *Hunt vs. Stewart*, 53 Md. 225.

(b) Cited in *Glenn vs. Baker*, 1 Md. Ch. 78.

and statement of the time and manner of its discovery by the complainant in her bill for relief, she being the custodiary of the papers of her testator, must, in the absence of all proof impeaching its verity, be received by the Court as evidence, and weighed in connexion with the other facts in the cause.

Where the circumstances are such as to induce an executrix, desirous of acting in good faith, to confess a judgment against her deceased husband's estate, the subsequent discovery by her of a receipt for the money claimed, of which she was utterly ignorant previously, will

366 enable her to apply * successfully to a Court of equity for a new trial at law, where the defence may be investigated.

One administrator, in nowise assenting thereto, is not liable for the consequences of the negligence or misconduct of a co-administrator. (c)

Where executors were sued in a joint writ, but from a failure to arrest one of them, judgments were rendered against them at different terms, and one of them subsequently obtained a decree in equity for a new trial, that Court must, to accomplish its own purposes, direct both judgments to be stricken out.

APPEAL from the equity side of Charles County Court. The bill in this cause was filed on the 27th April, 1837, by the appellants, and alleged, that sometime in the year 1832, a certain Richard B. Gardiner, the husband of your oratrix, departed this life without a will; that letters of administration on his estate were granted to your oratrix and William F. Bowling; that to March Term of Charles County Court, 1835, two suits were instituted by Richard B. Hardey, use of Edward Simms, against your oratrix and orator, W. F. B., as the administrators of R. B. G. One suit was instituted on a single bill, signed and sealed by the said R. B. G., on the 11th March, 1829, payable to Richard B. Hardey, two years after date, for \$1,815; and the other suit was instituted for the recovery of a balance of \$419, appearing to be due from the said R. B. G. to the said R. B. H., as his ward, with interest from the 13th June, 1817, true copies of both causes of action as filed in Charles County Court, are herewith exhibited as a part of this their bill of complaint; that said claims were passed by the Orphans' Court of Charles County, and to both affidavits is attached by R. B. H., of their justness and correctness. And your orator and oratrix further sheweth unto your honors, that W. F. B. was returned *cepi* at March Term of Charles County Court, and that your oratrix was not taken by the sheriff to that term of Charles County Court; that he appeared by Peter W. Crain his attorney to both suits, and when asked by said attorney if he should resist the payment of said claims, he replied, that they appeared to be just, and he was not aware of any defence to be made to said suits, and instructed him to confess judgments in both cases; that judgments

367 * were accordingly confessed by the said attorney as will appear by short copies of both judgments against said Wil-

(c) Cited in *McCann vs. Sloan*, 25 Md. 587.

liam F. Bowling, one of the administrators of Richard B. Gardiner, at August Term of Charles County Court, 1835, herewith exhibited as a part of this their bill of complaint; that subsequently, or at March Term of Charles County Court, 1836, your oratrix was returned *cepi* to the suits of R. B. H., and was advised by her friends to employ Peter W. Crain as her attorney; that upon reaching Court and having an interview with Mr. Crain, she was much surprised to hear that her co-administrator had confessed judgments in both cases, and communicated to her attorney her distrust of the correctness of said claims; that her late husband, R. B. G. had informed her that he had settled with Mr. R. B. H., and that she could not pay the open account unless she was satisfied that it was correct; that her attorney then informed her that the assets of the estate were bound for the payment of the judgments confessed by her co-administrator, and unless she could show the incorrectness of the claim, it would be folly to contest, and that he would investigate the claim and ascertain its correctness; and further, that the single bill and account were both sworn to be correct by R. B. H., who was a reverend minister of the Roman Catholic Church, and he concluded that they were correct; that her attorney then addressed a letter to William L. Brent, desiring to know the origin of both claims, when he received a letter from Edward Simms, informing him that one was for the real and the other for the personal estate, which letter is herewith filed and marked Exhibit C, and made a part of this her bill of complaint. That at August Term of Charles County Court, 1836, her attorney not knowing of any defence to be made, so as to overreach the judgment confessed by Bowling, one of the administrators of R. B. G., and ignorant of any receipt from R. B. H. to the said R. B. G., confessed the judgments without making any defence to the same, copies of which judgments are herewith exhibited as a part of this bill. And your oratrix further sheweth unto your honors, that she is not much acquainted with business, indeed she may with truth

* affirm, that she is ignorant in the forms of the law, and in consequence of a misunderstanding with her co-administrator, she has received no aid from him, but being convinced and satisfied of the injustice of the claim of R. B. H. for the open account, she addressed several urgent letters to her attorney, begging an interview with him, in the hopes of being enabled to satisfy him of its incorrectness and obtaining redress; that said attorney did see her about 1st April, and fully stated to her the nature of the claims, the manner in which the judgments were confessed, and also his opinion of their correctness, unless she could exhibit some settlement between Gardiner and Hardey, or a receipt from Richard B. Hardey to Richard B. Gardiner, his guardian. Your oratrix knowing nothing of business when she with William F. Bowling administered on Richard B. Gardiner's estate, submitted all the papers to Mr. Bowling to examine, expecting that he would communicate to her if there were any important

receipts amongst them, but he either did not find the receipt of R. B. H. to R. B. G., his guardian, or finding it, failed to avail himself of it and did not communicate it to your oratrix; that she then resolved to examine every paper connected with the business of R. B. G., and about the 3rd of April, 1837, and since the confession of said judgments, she found a receipt signed by R. B. H. to R. B. G., his guardian, dated 15th March, 1827, acknowledging the receipt of \$3,247.88 in full for the real estate of the late John F. Hardey, and in full of dividend of the personal estate of the late John F. Hardey, deceased, it being in full, and duly acknowledged the same before Edmund Turner, a justice of the peace for Charles County, which receipt is herewith exhibited as a part of this her bill. Now your oratrix expressly charges, that she was ignorant of the existence of said receipt at the time the said judgments were confessed, and has not received the benefit of said receipt in consequence of her ignorance of its existence, and that the single bill was evidence and conclusive of all dealings between the parties; and she further represents, that believing the judgments in the single bill to be correct, she has

369 * proceeded to make payments to Edward Simms, in addition to the payments endorsed on the bond, to the amount of \$750; that the money was paid, to be applied to the judgment in the bond, and expressly directed the credits to be so entered, but against the positive instruction of your oratrix. The said Edward Simms has given a receipt in one case without designating in the judgment one receipt to be applied in part payment of both judgments, and the third receipt against the wishes of your oratrix; and in violation of her instructions he has applied to his bond the judgment on the admitted balance, so far back as 1817. This conduct has excited the suspicions of your oratrix, and she has distrusted its correctness, and believes something was rotten, from their wish to credit the judgment on the open account, when she expressly charges her agent, Mr. Thomas E. Gardiner, to have it applied to the judgment on the bond, which receipts are herewith exhibited as a part of this her bill. And your oratrix further represents, that said Edward Simms, to whose use said judgments are entered, now threatens to issue *feri facias* on both judgments, all of which is contrary to equity and good conscience. Prayer for an injunction, &c.; that all the money paid by your oratrix may be applied to the judgment on the single bill as directed by her, and until it is so applied, she prays your honors to enjoin and prohibit them from issuing on said judgment, as it would be manifestly unjust; and also of subpœna to the said Richard B. Hardey and Edward Simms; that the said Edward Simms may answer particularly to the application of the payments, and that the said Richard B. Hardey, upon his corporal oath, may answer all and singular the matters and things herein contained, as fully and particularly as if he was again interrogated, of and concerning the same; and that he may fully and

distinctly answer what consideration passed for the single bill executed by the said Richard B. Gardiner to the said Richard B. Hardey, for \$1,815, and whether or not he executed the receipt herewith exhibited, and purporting to be in full satisfaction to his guardian, and whether said receipt did not include the balance appearing due of \$419.65, and for which he has *obtained judgment against the administrator of Richard B. Gardiner; and for **370** general relief. This bill was sworn to by C. G.

Exhibit A,—referred to in the foregoing bill of complaint: The Estate of Richard B. Gardiner, deceased,

To his ward, Richard B. Hardey, **DE.**
To \$419.66, a balance admitted to be due by the accounts of the deceased, and to be allowed upon the production of the proper vouchers.....\$419.66

To interest on the above sum, from the 13th June, 1817, until paid.

This account was verified by oath of Richard B. Hardey, on the 12th December, 1833, and passed by the Orphans' Court of Charles County.

Two years after date, I promise to pay Richard Benedict Hardey or order, eighteen hundred and fifteen dollars, with legal interest thereon, from this date, it being for value received. Given under my hand and seal, this eleventh day of March, eighteen hundred and twenty-nine.

\$1,815.00.

RICHARD B. GARDINER.

Received 23rd August, 1830, five hundred dollars.

\$500.

R. B. HARDEY.

Received 19th of November, 1832, two hundred dollars.

\$200.

RICHARD B. HARDEY.

Received April 12th, 1833, five hundred and seventy dollars on the within note.

\$570.

EDW'D. SIMMS.

22nd November, 1833. Received three hundred dollars.

\$300.

EDW'D. SIMMS.

\$1,815 00

Interest on \$1,815, for 16 months, 12 days, to 23rd

August, 1830..... 148 33

Amount..... 1,963 33

August 23rd—By cash..... 500 00

Amount..... 1,463 33

* Interest for 27 months, to Nov. 19, 1832..... 196 56 **371**

Amount..... 1,659 89

Nov. 19th, 1832—By cash..... 200 00

Amount..... 1,459 89

Brought forward.....	\$1,459 89
Interest fo. 4 months and 23 day, 12th, 1833.....	35 64

Amount	1,495 53
April 12th—By cash.....	570 00

Amount	925 53
Interest for 7 months to November 12th, 1833.....	32 75

Amount	958 38
November 23rd By cash.....	300 00

This note and the credits thereon were also verified on the 20th August, 1833, by the oath of R. B. H., and passed by the Orphans' Court.

Exhibit B,—referred to in the foregoing bill of complaint:
Charles County Court, August Term, 1835:

Richard B. Hardey, use of Edward Simms vs. William F. Bowling, one of the Adm'rs. of Richard B. Gardiner. Debt. Judg't. for \$1,815 debt, and \$1,815 dam's. and costs. The dam's to be released on pay't. of int. on the debt, from the 11th day of March, 1829, until paid. Pl'ffs. admit the receipt of \$500 on the 23rd day of August, 1830; the sum of two hundred dollars on the 19th day of November, 1832; the sum of \$570 on the 12th day of April, 1833, and the further sum of \$300 on the 22nd day of November, 1833, in part.

Cost, \$7.30.

Test.—JOHN BARNES, Cl'k.

Charles County Court, August Term, 1835:

Richard B. Hardey, use of Edward Simms vs. William F. Bowling, one of the Adm'rs. of Richard B. Gardiner. Dam's. Judg't for \$1,500—released on pay't. of \$419.66, with interest thereon from the 13th day of June, 1817, until paid.

Cost, \$8.90.

Test,—JOHN BARNES, Cl'k.

* *Exhibit C*,—referred to in the foregoing bill of complaint:
372 *Charles County Court, March Term, 1836:*

Richard B. Hardey, use of Edward Simms vs. Clarissa Gardiner, Adm'x. of Richard B. Gardiner. Debt. Judg't. for \$1,815 debt, and \$1,815 dam's. and costs. The dam's. to be released on pay't. of int. on the debt, from the 11th day of March, 1829, until paid. Pl'ff. admits the rec't. of \$500 on the 23rd day of August, 1830; the sum of \$200 on the 19th of November, 1832; the sum of \$570 on the 12th day of April, 1833, and the further sum of \$300 on the 22nd day of November, 1833, in part.

Cost, \$6.35.

Test,—JOHN BARNES, Cl'k.

Charles County Court, August Term, 1836:

Richard B. Hardey, use of Edward Simms vs. Clarissa Gardiner, Adm'x. of Richard B. Gardiner. Dam's. Jud't. for \$1,500, dam's and costs. The dam's. to be released on pay't. of \$419.66, with int. thereon from the 13th day of June, 1817, until paid.

Cost, \$7.05.

Test,—JOHN BARNES, Cl'k.

Exhibit D,—referred to in the foregoing bill of complaint :

Washington, 10th May, 1836.

Peter W. Crain, Esq. Sir,—Col. Brent called on me this morning for explanations respecting the judgments against the estate of Richard B. Gardiner; the open account you will perceive was for amount due Richard B. Hardey, for and on account of balance for the personal estate; the note was given for the share of the land. All of which I have more fully explained to Mrs. Gardiner when she visited the city last.

Respectfully your, ob't.

EDWARD SIMMS.

Exhibit E,—referred to in the foregoing bill of complaint :

Received this 13th March, 1827, of Richard B. Gardiner, my guardian, thirty-two hundred and forty-seven dollars eighty-eight cents, in full for the real estate of the late John F. Hardey, deceased, sold under an order of the honorable Justices of Prince George's County Court. At the same time, received * my full proportion of dividend of the personal estate of the said John F. Hardey, **373** deceased, it being in full.

RICHARD B. HARDEY.

Acknowledged by R. B. H., before a justice of the peace.

Exhibit F,—referred to in the foregoing bill of complaint :
(COPY.) Estate of Richard B. Gardiner, deceased,

To his ward, Richard B. Hardey,

DR.

To \$419.60, balance admitted to be due by accounts of deceased..... \$419 60
To interest on the above sum of money, from the 13th June, 1817, until paid.

Passed by the Court.

Test,—H. BRAUNER,

Feb. 13th, 1833.

Register of Wills for Charles County.

To amount of the above, with interest to 13th June, 1835, \$872 77
Balance on note to 1st July, 1835, is..... 756 27

\$1,629 04

On the back of the above is thus written, to wit:

1835, Sept. 11th. Received of T. E. Gardiner, two hundred dollars on the within claim, now due from the estate of the late R. B. Gardiner.

EDW'D. SIMMS.

Exhibit G,—referred to in the foregoing bill of complaint :

Washington City, 13th January, 1836. Received of Mrs. Clarissa Gardiner, three hundred and fifty dollars, on account of my claim against the estate of Richard B. Gardiner, late of Charles County, State of Maryland deceased.

\$350.

EDW'D. SIMMS.

Exhibit H,—referred to in the foregoing bill of complaint :

\$200. Received, Washington, October 22d, 1836, of Thos. I. Gardiner, Esq., two hundred dollars, on account of two judgments obtained against the estate of Richard B. Gardiner, deceased.

EDW'D. SIMMS.

Injunction and subpoena issued accordingly.

374 * At August Term, 1837, R. B. H. filed his demurrer to part, and his answer to other parts of the said bill. This defendant R. B. H., by protestation as to so much of the said bill as seeks to set aside or impeach, or have any relief against the judgments rendered at Charles County Court, at August Term, 1835, in favor of this defendant, for the use of Edward Simms the other defendant, against the said William F. Bowling, for the sum of, &c. &c., and against the judgment rendered by said Court at the August Term of the year 1836, in favor of this defendant for the use, &c., against the said Clarissa Gardiner, of a like sum of, &c.; or that prays an injunction against this defendant to stop his proceedings at law against the said Clarissa Gardiner and William F. Bowling; this defendant doth demur thereunto, and for cause of demurrer sheweth, that it appears by the complainant's own shewing, that the defendant, for the use of the said Edward Simms, the other defendant, hath obtained the said judgments complained against on the law side of your honor's Court, in due course of law, and this defendant is advised that said judgments cannot and ought not to be called in question in this honorable Court; and for further cause of demurrer this defendant sheweth, that there is not, as he is advised, any matter or thing set forth in and by the said bill, as a foundation of equity for this Court to interpose in relation to the said two judgments at law, but that all matter and things relative thereto were properly cognizable at law, and that the said complainants cannot now avail themselves in your honor's Court, the defences as set up by them here, and which was above cognizable upon said trials at law, when above they could have availed themselves of the benefit of the same, if the same be true, for which reasons, and for divers other causes, this defendant doth demur to so much of the said bill as aforesaid, and humbly prays the judgment of this honorable Court, whether he shall make any further or other answer thereto.

And as to so much of said bill as this defendant hath not before demurred to, this defendant in no sort waiving, &c. This defendant, for answer to the residue of the complainant's * said bill, this **375** defendant, speaking for himself, and not for the other defendant, he this defendant doth answer and says as follows: that it is true that letters of administration upon the estate of the deceased R. B. G. were granted as stated in said bill to the complainants, and that the suits as stated in said bill were instituted to March Term, 1835, of Charles County Court, on the law side, and for the amounts and upon the cause of actions therein stated; and it is also true, that judgments were confessed in said causes at the several terms of said Court, as stated in said bill of complaint, and for the amounts as stated and shewn by exhibits B and C, accompanying said bill, and that final judgments were rendered in said cases at the times stated in said bill. This defendant says, he knows nothing of what

conversations were had between said complainants and their attorney, Peter W. Crain, Esquire, and cannot admit that the conversations stated in said bill did take place; that it is also true, that Edward Simms the other defendant, did write the letters named in said bill, and marked as exhibit D; it is also true, that this defendant did give the receipt marked E, as an exhibit accompanying the complainant's bill, to his late guardian R. B. G., but under circumstances this defendant will hereafter in this answer disclose and state to your honors. This defendant further states, in answer to the interrogatories put to him in the bill of the complainants, that the consideration for which the note of \$1,815 was given, was the balance due for the real estate of this defendant, the amount of which the deceased R. B. G. had received as this defendant's guardian when a minor.

This defendant states that he did sign and execute the receipt exhibited with the said bill, and purporting to be in full satisfaction; and that it did include the said balance appearing to be due of four hundred and nineteen dollars and — cents, and for which one of said judgments was obtained; but positively denies that said sum of four hundred and nineteen dollars and — cents were paid at that time, before or since, by R. B. G., or any other person, and was never received; that the time said receipt was given, the said deceased, R. B. G., promised * to meet this defendant at Upper Marlboro', in Prince George's County, Maryland, some days there- **376** after, and to pay to him said sum, which was a balance due him on the personal estate, and that he disappointed him, and did not meet him as promised, nor did he ever pay the same, nor any person for him, or any part of the same; that said receipt was made at request of said R. B. G., deceased, in whose promise this defendant had a confidence that induced him to give it under the circumstances he did, and that upon said R. B. G.'s not complying with his promise, this defendant wrote him, in his life-time, one or more letters, stating the fact to him, and complaining of his not doing so, and asking payment, some of which letters are now in the possession of said Clarissa, one of the complainants, who found said letters among said R. B. G.'s papers, after his death; and this defendant is informed by Edward Simms, the other defendant, and he believes it to be true, that the said Clarissa saw and read said letters among said deceased's papers, in the presence of her said agent Thomas B. Gardiner, and Edward Simms, one of said defendants, before she filed said bill of complaint, or made affidavit to the same, and that said bill was made by her after she knew that said sum of four hundred and nineteen dollars and — cents had never been paid, and that said receipt was given under the circumstances before stated. And further this defendant says and states, that at the time he gave his said receipt for the amount of his real estate to his said guardian, his said guardian in payment gave him his note of hand for a large

amount, and that upon the day of the date of the said note of eighteen hundred and fifteen dollars, his said guardian settled the first note in part with this defendant, and gave him his said note for the eighteen hundred and fifteen dollars, payable in two years from its date, which was the time asked by said guardian, it being the balance due at said settlement for the real estate, and he then took up the first note; and that said note of eighteen hundred and fifteen dollars was given, a sum for the balance due and unpaid to this defendant on the note first given at date of the aforesaid receipt, and **377** was for the balance due upon the * real estate, and did not embrace the amount due for the personal estate, as before stated. And this defendant denies all and all manner of, &c.

The demurrer of Edward Simms, one of the defendants, to part and his answer to other parts of the bill.

The demurrer was the same as that of the other defendant.

This defendant for answer to the residue of the complainant's bill doth say as follows: that he did write the letter D. It is also true, that the other defendant did give the receipt marked E; but that the same were given as this defendant understood and believed, under circumstances he will hereafter name. This defendant further states, in answer to the interrogatories put to him, that he always understood from the different parties connected with the note of eighteen hundred and fifteen dollars that it was given for a balance due to the other defendants by his late guardian Richard B. Gardiner, for the real estate of the said other defendant, being a balance due upon a note for a larger amount, given by said guardian at a prior time for said real estate alone, a part of which prior note was paid at the time said note of eighteen hundred and fifteen dollars was given—and said note of eighteen hundred and fifteen dollars was given for said balance, and the first note taken up. This defendant also states, that he also understood and believes, that the aforesaid receipt did include the said sum of four hundred and nineteen dollars and — cents, but that the same was not paid at the time; but to save multiplying receipts, the said Richard B. Gardiner promised the other defendant that if he would include the said sum in said receipt, that he the said Richard B. Gardiner would meet him in a short time thereafter, at Upper Marlboro', Prince George's County, Maryland, and would then pay him the said sum of money, which this defendant says he never did. This defendant, since the death of the said R. B. G., and subsequent to the date of said receipt and note, has seen and read letters from the other defendant to the said R. B. G., shewn to him by the said Clarissa Gardiner, and in her possession, and which letters were after the said receipt, and to the best **378** of his recollection, after said notes were given, and * in the life-time of said R. B. G., in which the other defendant complained to said deceased, that he had not met him at Upper Marlboro' aforesaid, to pay the said sum of money as aforesaid, and which

was included in said receipt, after the promise of said deceased to pay the same subsequent thereto, and as aforesaid, and that the said letters were in the proper hand-writing of the other defendant. This defendant being well acquainted with the same, having often seen said other defendant write, and that said letters were received by said deceased, in his life-time; and your honors are prayed to order the complainants to produce the same. This defendant further states, that the said letters were read in presence of said Clarissa Gardiner, who gave them to this defendant to read after said judgments were rendered, and before she made her affidavit to the said bill of complaint, and that the agent of said Clarissa Gardiner, Thomas I. Gardiner, was present when the same was shewn, and saw and heard them read at Clarissa's own house. This defendant further states, that his recollection is, that when the agent of said Clarissa Gardiner made the payments alluded to in the bill, he did request this defendant to credit them upon the note judgment, and that he stated the sum to be; that said Clarissa wished the note judgment to be paid first, but denies positively that said agent or said Clarissa, or any one, ever stated that it was because the other judgment was not justly due. This defendant also positively denies, that he did give the credits on the judgments for the reasons, and with the views stated in the said bill of complaint, or that he ever thought, or had reason to think, that the judgment complained against was not just; but on the contrary, he knew that the said sum of money for which said judgment was obtained, had never been paid. This defendant also positively denies that said Clarissa was ignorant of said receipt at the time said judgments were given, for it was in her possession, as administratrix upon said deceased's estate. And this defendant further denies that said note is evidence, conclusive and final, of all demands between the parties; and this defendant denies all and all manner of, &c.

* The general replication was then filed, and a commission issued to take proof, but no witness was examined except the **379** Rev. R. B. Hardey, one of the defendants, who was objected to as incompetent, for the reasons stated in the opinion of this Court, and his evidence rejected.

At August Term, 1841, the cause was set down by consent for final hearing upon the bill, answers, exhibits and proofs taken, the complainants still excepting to the competency of the defendant, R. B. H., as a witness for his co-defendant. The County Court [C. DORSEY, A. J.,] dismissed the bill with costs, and the complainants appealed to this Court.

The cause was argued before ARCHER, DORSEY, and CHAMBERS,

J. Johnson, for the appellants. *R. J. Brent*, for the appellees.

DORSEY, J., delivered the opinion of this Court. Against the making the injunction, perpetual, to the judgments against the appellants as administrators of Richard B. Gardiner, each to be released on the payment of \$419.66, &c., or to the granting a new trial in the cases in which they were rendered, the testimony of Richard B. Hardey has been relied on by the appellee, Simms, who insists, that thereby the whole equity of the bill is disproved, and that substantial justice appearing to have been administered to the parties by the rendition of the judgments complained of, the complainants are entitled to relief, neither in the specific mode in which they have sought it by their bill, nor in that in which it has been claimed for them in the argument before this Court. But to the admissibility of this testimony, exceptions have been taken, any one of which, if sustained, must exclude it from the consideration of this Court. The exception mainly urged, was, that being a party to the suit, his testimony was taken before a commissioner without a previous order of the Court for that purpose. In answer to which it has been insisted in behalf of the appellees, that the exceptions filed to the admissibility of * Hardey's testimony do not present the point or

380 ground of objection now asserted in this Court, and that under the Act of 1832. ch. 302, and the decisions of this Court, it must affirmatively appear, that the point raised in the Court of Appeals was the point presented to the consideration of the Court below, and by it decided. Conceding this doctrine to the fullest extent to which it can reasonably be carried, we think the exception filed below does with sufficient precision present the very points now raised before us. The appellants excepted to the competency of Hardey as a witness, upon three several grounds—1st, "because he is interested in the event of the suit. 2ndly, because he is one of the defendants in the suit. 3rdly, because he was the legal plaintiff in the cause." Looking at the three exceptions in connection, what point can it rationally be conceived is raised in the second, unless it be that now urged before this Court? But whether it be so or not is wholly immaterial, this Court having, on more than one occasion, decided, that on an objection to testimony, the point decided by the Court is its admissibility or inadmissibility, not the sufficiency or insufficiency of the reasons assigned for its rejection. The exception, therefore, we think sufficiently pointed, and that the testimony to which it is addressed is excluded by it. See the case of *Jones vs. Hardesty and al.* 10 G. & J. 414. On the part of the appellees it is insisted, that the rejection of the testimony taken under the commission issued for that purpose, cannot operate to their prejudice, or in the slightest degree influence the results to which the Court must have arrived, had the testimony been rescued from the objections made to its reception. That the same grounds against perpetuating the injunction or granting a new trial at law, are established by the answers of the appellees, as the entire record would have presented, had no exceptions

been taken to the testimony. Without stopping to moot the question, how far the answer of a co-defendant, the legal plaintiff in a cause, who has no interest in the subject-matter in controversy, can be relied on as evidence for his co-defendant, the real party in interest in the cause, let us see whether the statements in the answers here * pressed into that service, are admissible as evidence to rebut the complainant's equity, as it appears upon the bill, exhibits, and admissions in the answers. The statements alluded to are those given in explanation and avoidance of the receipt of Hardey, exhibited with the bill. The question turns entirely upon the enquiry, whether they are responsive to the allegations or interrogatories contained in the bill of complaint. By its allegations, it has not been pretended that these disclosures were responsively drawn from the appellees. But it is alleged, that they were responsive to the interrogatories propounded to Richard B. Hardey alone. Upon a careful examination of those interrogatories, we are clearly of opinion, that the statements in the answers relied on as a bar to the complainant's equity, are not responsive to the bill, but matters of defence, set up in avoidance of the receipt, the ground work of the complainant's claim to relief. The bill asserts, that the receipt, as upon its face, it strongly purports, but does not conclusively shew, was given for the same cause of action on which the judgments were rendered. And the interrogatory inquires whether he executed the receipt? "and whether said receipt did not include the balance appearing due of four hundred and nineteen dollars and sixty-six cents, and for which he has obtained judgments" against the appellants? To both of which inquiries he answered distinctly and fully in the affirmative; and then, as matter in defence, and in avoidance of the receipt, proceeded to state a variety of facts, none of which were charged in the bill, and in relation whereto he had not been interrogated. Had the interrogatory called on him to state whether he had not been paid the \$419.66, for which the receipt had been given, the door would have been opened to the disclosures he made, and they might well be regarded as impairing the weight attached to the receipt. But not being responsive to the bill, nor sustained by the proof, at the final hearing of the cause, they are entitled to no consideration.

The obstacles alleged to be interposed by the proof and answers to the relief prayed, having been removed, let us examine the next defence which has been set up by the * appellees, to wit, that the bill itself does not disclose a case in which it is competent for a Court of equity to give any relief. We will first consider this proposition in reference to the judgment complained of, which has been obtained against Clarissa Gardiner. The ground upon which her right to relief is denied, is, that she was guilty of such negligence, in not pleading in bar to the judgment recovered, the evidence she now relies on to show that it ought never to have been rendered

against her; that a Court of equity can give her no aid in avoiding its payment. It is apparent from the record, that at the time she states her discovery of the receipt to her intestate, it was too late, by a motion for a new trial or otherwise, to have made it available, at law, as a defence to the claim for which judgment had been rendered against her. It must also be conceded, that her denial on oath of all previous knowledge of the existence of the receipt, with her statement of the time and manner in which she discovered it, she being the custodiary of the papers of her deceased husband, must, in the absence of all proof impeaching her verity, be received by the Court as evidence in the cause, and be weighed in connection with all the other facts established by the bill, answers and exhibits, in forming an opinion upon the appellant, Clarissa's claim, to the relief she seeks. If she has not forfeited all claim to the favor of a Court of equity, and the testimony of Hardey, and the portions of the answers deemed not responsive to the bill, be excluded, it appears to be conceded, that Mrs. Gardiner would be entitled to the interposition of a Court of equity in her behalf. But it is said, that her statement that her husband had informed her that he had settled the claim of Hardey, and her not looking amongst his papers for the receipt, as the evidence of such settlement, before the judgment was rendered, are such acts of negligence, as will deprive her of all favor in the eyes of the Court of Chancery. We do not regard her conduct, under the circumstances of this case, as forfeiting all claim to such favor. It must be remembered, that she was a woman not presumed to have much acquaintance with the nature of the business in which

383 she was engaged; that she was associated in *the administration with a man in whom she had confidence, to whom she confided all the papers of the deceased, and in whose ability properly to administer the assets of the deceased, it is fair to presume, she reposed confidence. The existence of any receipt had never been communicated to her by her husband, or any one else. The claim had been sworn to by Mr. Hardey, a minister of the Gospel, and passed by the Orphans' Court of her county, upon the records of which, in all probability, it appears from the guardian's accounts, settled by Richard B. Gardiner himself, that the sum claimed was due by him, and that he had never there claimed or been allowed a credit for its payment. In addition to this, the co-administrator, mainly relied on by her in the settlement of the intestate's estate, who was in possession of all his papers, and who the widow had a right to presume had unsuccessfully searched for the evidence of the payment of this claim, had long before confessed judgment for its amount. Would not the instance be rare indeed, where a widow, administratrix, similarly situated, would have pursued a different course from that to which Mrs. Gardiner reluctantly yielded? Can we then, consistently with that liberality and justice which always control the decisions of a Court of equity, say, that she has been

guilty of such negligence, in not defeating at law the judgment which has been rendered; that the doors of a Court of equity are forever closed against her, when apart from the imputation of neglect, as far as the proceedings before us permit us to look, she appeals to such a Court to give her an opportunity of discharging herself, by a trial at law, from a claim which, as far as the proceedings before us will enable us to look, appears by an admitted receipt in full, to have been satisfied and paid nearly fifteen years ago. Thus, to place her beyond the pale of equitable relief in a case of such apparent injustice and hardship, would, we think, under the circumstances of this case, be inconsistent with the enlightened and liberal principles by which Courts of equity are governed. So far from exhibiting that negligence and inattention to her duty as administratrix, which have been imputed to her, she appears to have yielded to the **384** * strong array of circumstances against her, and her utter ignorance of the existence of that receipt, by which only the claim could have been successfully resisted. Even after the judgment, her suspicions do not appear to have slept. She called on Simms to obtain all the information she could upon the subject; and when, subsequently, her suspicions of foul play were increased by Simms' refusing to credit the payments she made to the judgment, to which she directed their application; as a last resource, a forlorn hope, she determined herself to search the papers in the hands of her co-administrator, and on that examination, the discovery of the receipt took place. One administrator, in no wise assenting thereto, is not liable for the consequences of the negligence or misconduct of a co-administrator. And it would, in this case, be rather a severe measure of justice to visit on Mrs. Gardiner the results which should attach to the delinquency of Bowling.

We are, therefore, of opinion, that Mrs. Gardiner is entitled to have the judgment of which she complains stricken out, and her case brought up by regular continuances to the ensuing term of Charles County Court, where the case is to be tried as if no judgment herein had ever been rendered.

Having expressed this opinion as to the judgment rendered against Clarissa Gardiner, it follows as a necessary consequence, that the judgment against William F. Bowling must share the same fate; both judgments being rendered in a joint action against the two defendants, the same judgment must be rendered against both. The judgment against Bowling must, in like manner, be stricken out, and the case brought up by continuances, and both cases be consolidated and tried.

As respects the payments made to Edward Simms by Mrs. Gardiner, since the rendition of the judgments against her, this Court will, of course, direct them to be altogether credited on the judgments rendered against the appellants on the note of the intestate for \$1,815.

Decree reversed without costs.

385 * CHARLES OFFUTT and HENRY CLAGETT vs. WILLIAM C. GOTT.—December, 1842.

Pending a *caveat* to a nuncupative will appointing an executor, the Orphans' Court granted letters of administration *pendente lite*. After this, the *caveat* was overruled, and the will established by the Orphans' Court. The caveators appealed. This suspends all further proceedings before the Orphans' Court, and while it is undecided, that Court cannot proceed to grant letters of administration. (a)

Appeals from the Orphans' Court are heard and determined at the term to which the appeal is taken.

The Act of 1798, ch. 101, sub-ch. 2, sec. 9, gives the Orphans' Court jurisdiction to decide a *caveat* to a will or codicil respecting personal property, or appointing an executor; the 11th section authorizes either party, aggrieved by its decision in such cases, to appeal, declares, that such appeal shall stay further proceedings, and that the decree of the Court appealed to, shall be final and conclusive; and the 19th section of the 15 sub-chap. of that Act, does not warrant the granting letters of administration in chief, pending an appeal from a decree overruling a *caveat* to a will.

APPEAL from the Orphans' Court of Montgomery County. On the 1st of November, 1842, the appellants, as the next of kin of Aaron Offutt, deceased, filed their petition in said Orphans' Court, alleging, that they have by their petition filed this day, prayed the Court to amend the record in the case of William C. Gott, libellant, against the appellants, respondents, that they may appeal from said decree when the same is amended, or whether the same is amended or not, which petition is now pending and undecided; that they have been informed and believe, that the appellee, notwithstanding the pendency of said proceeding, and prayer for said appeal, is about to make application for letters testamentary on said estate of Aaron Offutt, deceased; they therefore pray letters testamentary may not be granted until the appeal prayed for is finally decided, because your petitioners allege, that letters of administration *pendente lite* have been granted the appellants, which are valid and in force until the controversy concerning the will of the said deceased is ended, and because the said letters testamentary cannot with propriety be granted before the appeal is decided, and if the same are granted,

the * Court here cannot provide for conforming to the **386** decision of the Court above, whether the said decision be eventually for or against the appellant, &c.

On the 2nd November, 1842, the appellee answered the said petition, and alleged, that by decree of the 28th October, 1842, the nun-

(a) Cited in *State vs. Williams*, 9 Gill, 176, and *Edelen vs. Edelen*, 10 Md. 52.

cupative will of Aaron Offutt, so far as relates to the appointment of your petitioner, executor, was adjudged to have been lawfully made, and accordingly admitted to probat by said decree. The only object and purpose of said will, as set up, was the appointment of the appellee, his executor. Prayer—that letters may be granted under said will.

On the 9th November, 1842, the Orphans' Court passed a decree, which, after reciting the proceedings in the case, and upon the nuncupative will of the deceased; its admission to probat; the appeal from that decree by the appellants, with the fact of their previous appointment as administrators *pendente lite*, decreed as follows: "and the Court, considering the delay that may occur before the said Court of Appeals shall affirm or reverse the said decree, would operate great injury to the said estate, adjudge, &c., that the prayer of the said Charles Offutt and Henry Clagett be refused, and that letters testamentary be granted to the said William C. Gott, upon the personal estate of the said Aaron Offutt, upon his entering into bond, with security, to be approved by this Court according to law. The petitioners, under the petition of 1st November, 1842, appealed to this Court.

The cause was argued before STEPHEN, DORSEY, and CHAMBERS, JJ.

R. I. Bourie, for the appellants. No counsel argued for the appellee.

DORSEY, J. delivered the opinion of this Court. The appeal in this case has been well taken. The 9th section of the Act of 1798, chap. 101, sub-chap. 2, provides, that if any person *caveat* a "will or codicil respecting personal property or appointing an executor," the *caveat* shall be * decided by the Orphans' Court. By the 11th section of the same Act and sub-chap. it is enacted, that **387** either party conceiving him or herself aggrieved by the decision of the said Court, relative to the probat, may enter an appeal; and that such appeal shall stay further proceedings of the Orphans' Court; and that the decree of the Court appealed to shall be final and conclusive. To grant letters testamentary thereon, pending the appeal taken from the decision of the Orphans' Court, is an act clearly prohibited by the Act of Assembly referred to. Nor does the reason assigned by the Orphans' Court for its decree, give to it the slightest support. The Appellate Court, by which the decree for admitting the will to probat was to be reviewed, was to sit in less than one month from the time of awarding letters testamentary, and were bound by law to determine the appeal during its approaching session, so that there was no foundation for the reason assigned by the Orphans' Court for their decree appealed from in this case, that great injury would result to the estate of the deceased by the delay of the

Court of Appeals in deciding on the appeal. Nor was there any ground for the apprehension of injury to the estate, had the delay referred to, actually occurred, which the granting of letters testamentary was necessary to prevent; as there was no act, which, under the circumstances of this case, the Orphans' Court ought to have authorized or required at the hands of the executor thus commissioned, which the administrators *pendente lite* were not equally competent to perform. Neither can the acts of the Orphans' Court complained of, be sustained under the 19th section of the 15th subchapter of the Act of 1798, chap. 101, as the granting of letters testamentary was not in the case before us, a proceeding therein, "which may with propriety be carried on before the appeal is decided."

The Court will sign a decree reversing the decree of the Orphans' Court, with costs to the appellants in both Courts.

Decree reversed, with costs.

388 *FRANCIS L. DARNALL, and Wife vs. PHILIP HILL and others.—December, 1842.

R. died in 1816, leaving a widow and minor children. In the following year the widow married D. who, with his wife and her children went into possession of the estate of R. In 1820, D. was appointed guardian of the children; he remained in possession, cultivating and using the lands and negroes, &c. until 1832, receiving and selling the crops, and using their proceeds, when he delivered up the estate to the children, declaring he should not claim anything for his wife's thirds of her first husband's estate. Upon a bill filed in 1833, by D. and wife, against the heirs of R. claiming her third of the rents and profits of the estate, her right to dower being admitted, it appeared that D. had delivered the crop of 1831, to W. one of the children. *Held*, that if D. had any claim for a proportion of the crops of 1831, it was against W. at law, and that he could not recover against the other defendants, prior to filing his bill in 1833, and that, under the circumstances the complainants were not entitled to interest on their portion of the rents and profits, when ascertained.

It is against equity to permit a party to take advantage of a course of conduct, pursued by another in consequence of the declared intentions of the claimant, made with full knowledge of his rights.

Where a widow's right to dower is admitted, she is, before its assignment, entitled to an account of the rents and profits of the land, and one-third of the net amount thereof, as her proportion. (a)

In a bill for a widow's proportion of rents and profits in lieu of dower, her right being admitted, no allegation of a demand for an assignment of dower is necessary. The heir in possession is answerable for damages from the death of the husband, even without demand, unless he plead

(a) Cited in *Price vs. Hobbs*, 47 Md. 389.

tout temp prist ; and even then, he is liable from the date of the subpoena against him.

Upon a bill by husband and wife, claiming a portion of rents and profits, as damages for the detention of her dower or in lieu of dower, the defendants, the heirs of the first husband, cannot set off a demand which they may have against the second husband, for the use and occupation of the land during their minority. The two claims are not due in the same right; and that for damages would survive to the wife. (b)

Where the proof shews that the defendants were in possession of land, as heirs-at-law, the legal presumption would be, that such possession continued until the contrary was shown.

According to the practice of the Court, an account charging rents and profits may be brought down to the date of the decree in this Court, or the Court of Chancery, or to the time of the delivery of possession of the dower assigned to a widow.

On the 2nd October, 1833, the complainants filed a bill claiming an account of rents and profits, and a proportion thereof as due one of them for dower in her deceased husband's estate. On the 3rd of the same month the same * complainants filed another bill against the same defendants, claiming an assignment of dower, and an account and 389 proportion of rents and profits up to her assignment. Upon the latter bill a commission to assign dower was issued, executed, returned, and finally ratified in 1833; but the decree took no order, and passed no judgment upon the subject of anterior rents and profits. *Held*, that the proceedings and decree under the second bill was no bar to a recovery under the first.

Under the Act of 1832, chap. 302, sec. 6, this Court will notice judicial proceedings embodied in the record, not excepted to, neither pleaded in bar, nor offered in evidence, but which may materially affect the state of the accounts between the parties, so far as to remand the cause with instructions for further proceedings. (c)

Where two bills are depending in the same Court, between the same parties, upon the same subjects-matter, at the same time, and various steps are taken by consent in both, the Court under circumstances will infer, that it was the intention of parties to litigate one portion of their claim under one bill, and another part under the other, and not treat a decree, under the bill which covered the whole ground, as a technical bar to the other.

APPEAL from the Court of Chancery. The proceedings in this case were first commenced in Prince George's County Court, and subsequently removed to the Court of Chancery.

On the 2nd October, 1833, the appellants filed their bill, alleging, that Richard Hill died some time in the spring of 1816, intestate, leaving the following children his heirs and representatives, to wit: Philip Hill, aged 13 years; Mary Ann, aged 11 years; William, aged 9 years; and Elizabeth, aged 6 years: that letters of administration upon his estate were granted to Margery Darnall, wife of Francis L.

(b) Cited in *Scott vs. Scott*, 17 Md. 91; *Gibbs vs. Cunningham*, 4 Md. Ch. 325.

(c) Cited in *Brown vs. Thomas*, 46 Md. 642.

Darnall, and a certain Joseph H. Wilson, who returned an inventory of said estate, but no account of their administration; that the complainants intermarried in the year 1817; that the personal estate of the said Richard has been finally settled, and his several representatives respectively paid their portions of his estate; that complainant F. L. D. in the year 1820, was appointed guardian to all the said children, and took possession of their property, upon the express condition assented to by the Orphans' Court, from which he derived his appointment; that he should, out of the interest and profits of their estate, real and personal, maintain, clothe and educate the said wards or *minor children, and that upon so doing he should not be charged with said interest, rents and profits, during the continuance of his said guardianship, which undertaking he has faithfully performed; that the profits of their proportion of their father's estate, was not more than sufficient to enable him to execute the trust undertaken by F. L. D. with the Orphans' Court; that his guardianship has some time since expired, and he has fully paid off his said wards; that Philip Hill relinquished all his right to any part of his father's estate, in consequence of a devise made to him by his aunt Ann Magruder, as per Exhibit A; that the said Richard died seized and possessed of a tract of land called Baltimore, containing 443 acres, to her dower in one-third of which your oratrix was and is entitled, together with the rents and profits therefrom arising; that after the marriage of complainants the said F. L. D. resided upon the said tract, and cultivated the same until March, 1832, when he left the same; that at the time he removed from the said tract, there was on the same a large and valuable crop of wheat and tobacco, to one-third of which complainants were entitled, in virtue of the right of dower of the said Margery, which said crop has been since sold by William Hill for a large sum, the whole of which has been appropriated by him to the use of himself, Mary Ann and Elizabeth Hill; that the said M. A., E. and W. H., do now reside, and have resided upon the said tract of land, ever since your orator removed from the same, and have made large crops upon the same, and disposed thereof; to one-third of which the complainants allege they are entitled, in right of the said M. D. The bill then alleged, that the defendants were indebted to F. L. D. for sundry specified advances and payments made by him to and for their account, and that all the children were of full age except Elizabeth, now about 18 years of age. Prayer for subpœna, and an account of the rents and profits of the land, and payment of the advances made, and for general relief, &c.

The will of Ann Magruder, dated 14th June, 1824, and admitted to probat 21st Dec. 1824, devised a tract of land to *Philip
391 Hill in consideration that he would relinquish all his interest in his father's estate to his brother and sisters.

The account filed with the bill stated the claims of F. L. D. against the heirs of Richard Hill, and was brought down to 20th May, 1833.

This record also contains another bill filed by F. L. D. and wife, on the 3rd October, 1833, for an assignment of dower by commissioners, to Mrs. Darnall, as widow of Richard Hill, and an account for rents and profits, against the same defendants, as the first bill.

The answers of Mary Ann, William and Elizabeth Hill, to the bill for dower, admitted the death of their father, his seizin in fee, his marriage with their mother and her subsequent marriage with F. L. D.; that after the intermarriage of complainants, which took place in the year 1817, the complainants took possession of the real and personal estate of R. H., and worked the land with the negroes left by R. H. up to the year 1832, making upon the same large crops, which were sold by F. L. D., who after the mere pittance applied by him to the support, &c., of your respondents, applied the residue of the proceeds to his own immediate purposes; that F. L. removed from the farm left by R. H. in the year 1832, and stated to these defendants at the time, that he did not intend to claim the dower of his wife in the said land; that he never mentioned any thing about the dower aforesaid until some time in the summer of 1833, at which time he claimed one-third of the crop which had been made since he left the land; that he was then informed by one of these defendants, W. H., that he F. L. D. had taken away all his wife's proportion of the personal estate, and that the defendants would not agree to give him any part of the crops, but they were willing the dower might be laid off whenever he might think proper to apply for it, and are now willing that M. D's dower may be assigned her, as the Court shall direct, but are not willing to pay the complainants any part of the proceeds of the land.

The answer of Philip Hill to the bill for dower, disclaimed all interest in his father's land, and alleges that he had * frequently heard F. L. D. say, that he never intended to claim his wife's dower in the land in the proceedings mentioned, and he also stated, that when he left the estate the children should not owe one cent to any one. **392**

The answers of P. H., John B. Magruder and Mary Ann his wife, William and Elizabeth Hill, to the bill of 2nd October, 1833, admitted that their father R. H. died intestate, in 1816, leaving the complainant Margery, his widow, and the above defendants his children, heirs-at-law; that M. and J. H. W. became his administrators; that in 1817, F. L. D. intermarried with the widow, and was appointed their guardian in 1820; that he immediately after his marriage took possession of the valuable real estate left by their father R. H., and with the negroes, stock, &c., left by him, worked the same, and received and applied the proceeds thereof from the time of his marriage until his appointment as guardian, to wit, for the years 1817 to 1820 inclusive, to his own use, except so far as finding and cloth-

ing the defendants, who lived with him on the estate of their father; that they are ignorant of the conditions on which F. L. D. became their guardian, and deny those alleged by him, or that he faithfully performed his duty as guardian. The answer then imputed various delinquencies to said F. L. D. as guardian, and alleged, that from his appointment in 1820, up to 1832, some years after the expiration of his guardianship, he remained upon the estate of the defendants, and for the whole of said time, except the crop made in 1831, received the proceeds of said estate, and during the whole of said time applied the balance, after paying the expenses of the family, to his own individual use; that he is largely indebted to them; that in 1828, ignorant of his liability, they gave him receipts, but two of the defendants were then minors. The answer then admitted that R. H. died seized of the real estate in the bill mentioned, to dower in which, they also admit the complainant Margery to be entitled, but deny the right of complainants to rents and profits of said estate, as claimed by them; that the complainants have filed a separate bill in this Court for their dower in said estate, and their proportion of

393 *rents and profits, in virtue of said right of dower, which bill has been fully answered. The answer further stated, that the crops alleged by the complainants to have been left by them on said estate, when they removed therefrom, were sold by the defendant William Hill, but that the proceeds were not applied to his own use, but were applied to the payment of the debts which had been contracted by the said F. L. D. and the defendant W. H., for the use of the estate, by the advice and direction of F. L. D.; that complainants never made a demand on defendants to have the dower now claimed, laid off, but on the contrary, F. L. D. always stated to the defendants, that he should not claim his wife's dower in said land, until some time in the year 1833, when he for the first time stated that he intended to claim it. The residue of the answer related to the personal estate of R. H., and proceeds of the crops, their receipt and application.

On the 6th May, 1836, and on the petition of complainants, a commission was ordered and issued to lay off the dower of Margery Darnall.

On the 1st December, 1836, the commission to lay off dower was remanded, as erroneous, by the County Court, to the commissioners. This was executed on the 12th April, 1837, and returned to the County Court, with a plat.

Commissions to take testimony were also issued, executed and returned.

On the 6th February, 1838, the County Court [C. DORSEY, A. J.] on the bill of 3rd October, 1833, being satisfied that the complainant Margery, as the widow of Richard Hill, deceased, is entitled to a right of dower in his real estate, by the consent of parties, decreed, that the return made to this Court by the commissioners since the

commission was remanded, who were heretofore appointed by this Court to assign and lay off said dower, be and the same is hereby ratified, &c.

On the 11th July, 1839, by consent the cause was referred to the auditor to report accounts, the equities of the parties being reserved until the hearing of said accounts on such exceptions as may be taken to them respectively. The auditor *stated and reported two accounts, A and B, which are sufficiently set forth in the **394** opinion of the Appellate Court.

On the 16th January, 1840, the causes were removed from Prince George's County Court, upon the suggestion of the defendants, to the Court of Chancery, where after exceptions by both parties to the proof, and by the defendant to the sufficiency of the bill, as not containing any allegation of a demand and refusal of dower, nor the annual value of the rents and profits, and that the bill made no case. The Chancellor [BLAND,] decreed that the bill filed on the 2nd October, 1833, be dismissed with costs, being of opinion that there was no just foundation in fact for the claim of the plaintiffs for rents and profits of so much of the real estate in the proceedings mentioned in which she was entitled to dower, and that the said claim for rents and profits, having been fully put in issue under the bill of complaint, filed by them on the 3rd October, 1833, has been finally adjudicated upon and barred by the decree passed in that cause on the 6th February, 1838.

From which decree the complainants appealed.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

Alexander and J. Johnson, for the appellants. *C. C. Magruder and T. G. Pratt*, for the appellees.

ARCHER, J. delivered the opinion of this Court. The complainants, on the 2nd of October, 1833, filed their bill in Prince George's County Court, alleging, among other things, that Richard Hill, of Prince George's County, died seized of certain lands in the said county, leaving one of the complainants his widow, who afterwards intermarried with the other complainant, and that she was entitled to dower in the said lands, and that the complainant Francis L. Darnall, who intermarried with Mrs. Hill in the year 1817, was in the year 1820, appointed guardian of the children of Richard Hill, and received the rents and profits of the said lands as such guardian until the year 1832, and expended said rents and profits in the **395** *education and maintenance of the children of Richard Hill, except the crops of 1831, which the complainant Darnall passed over to William Hill one of the children of Richard Hill, and that since the year 1832, the children of Richard Hill, except Philip Hill, who relinquished his interest in his father's estate to the other represen-

tatives of Richard Hill, have been in possession, and have made large crops of "wheat, corn, and tobacco, to one-third of which they alleged they are entitled, in virtue of the right of dower of Mrs. Hill." And they pray an account of their proportions of the crops and moneys by them received, and for other and further relief, as to the Court shall seem meet.

The answer to this bill is filed 9th April, 1834, and by this answer the right of dower is admitted, but the claim to the rents and profits is denied.

It appears from the evidence in the cause, that the complainants occupied the land from the day of their intermarriage in the year eighteen hundred and seventeen, until the year 1832, when the lands were given up to the devisees of Richard Hill. It is further proved, that the complainant, Francis L. Darnall, declared, just before and a short time after he delivered possession to the devisees, that he should not claim any thing for his wife's thirds of her husband's estate, and there is no evidence in the cause that he interposed any claim until the filing of this bill.

Accounts have been stated by the auditor. The one account A, stating the complainant's claim from the death of Richard Hill to the time when it is alleged dower was assigned to Mrs. Darnall. The other account B, states the claim from 6th May, 1832, to 6th May, 1838, and besides, allows the complainants one-third of the crop raised on the lands in 1831. In both these accounts interest is allowed.

The complainants having been in possession of the whole lands until 1832, do not seek, in this Court, to recover the rents and profits according to account A, but insist that account B is stated upon proper principles, and they claim its allowance at the hands of this Court.

396 * The allowance in account B, for one-third of the crop of 1831, could not be allowed in this case. The crop of that year, or its proceeds, were, by Francis Darnall, one of the complainants, placed in the hands of William Hill, one of the defendants, from whom, if he be entitled to recover it, he must seek redress in a different form of proceeding, and before another forum. The defendants were not in possession of the lands during the year 1831, but the complainants were in possession, and could have no pretence for charging damages against the defendants for that year, nor do we think the complainants could recover mesne profits at any time before the filing of the bill of the 2d October, 1833, because, according to the proof, the complainant, Francis L. Darnall, frequently declared that he did not intend to claim any thing for his wife's thirds of her first husband's estate, and no contrary intention is manifested until the filing of the bill in this cause. But for this declaration, it is probable, that the defendants would have assigned dower to their mother, and we think, therefore, that it would be

inequitable to permit the complainant to take advantage of a course of conduct pursued by the defendants, in all probability, in consequence of the declared intentions of the complainant.

The bill is inartificially drawn, but the widow's right to dower is distinctly stated; the possession of the defendants is also averred, and that large crops were made on the lands, and although strictly, the widow would not be entitled to one-third of the gross amount of the crops, she would have a right to one-third of the net amount thereof, and she would be entitled to an account of the crops, so that the net annual value might be ascertained, and under the prayers in the complainant's bill; so far as the frame of the bill is concerned, would be entitled to a decree for one-third of such balance as her proportion of the rents and profits.

No allegation of a demand for an assignment of dower was necessary to have been made in the bill. The heir in possession is answerable for damages from the death of the husband, even without demand, unless the heir plead *tout temp prist*; *and in *Park on Dower*, 303, it is asserted, that even when the heir plead **397** *tout temp prist* with success, the demandant shall recover damages from the test of the original to the execution of the writ of enquiry, so that if we were to consider that the answer in this case was equivalent to a valid plea at law of *tout temp prist*, and that it was put in, in time to be available, still damages might be decreed from the date of the subpoena.

We think the circumstances of this case would preclude the allowance of interest to the complainants, if the cause were in a condition to enable us to decree rents and profits.

It is unnecessary to determine whether the answer was filed in time, admitting a right of dower, and declaring a readiness at all times to assign dower, if it had been demanded, so as to enable us to determine whether damages could be claimed from the death of the husband, or for any period anterior to the filing of the bill, because we have seen that complainants, from other considerations, are not entitled to damage anterior to the filing of the bill.

Whether a claim exists on the part of the heirs against the complainant, Darnall, for the use and occupation of the land from the date of his marriage in 1817, he having occupied the same from that period until 1832, and what, if any, may be the amount of such claim we have not deemed it necessary to examine, because we are satisfied that such a claim could not be set off against the demand of the husband and wife for the wife's proportion of the rents and profits of the land. The two claims are not due in the same right, and the claim, if recovered in this case, surviving to the wife.

It is said, that as there is no proof of possession in the defendants, after the year 1834, that no decree for rents and profits, accruing after that period, could be passed against the defendants. But if there existed this defect of evidence, we apprehend, as the proofs

show the defendants to be in possession, the legal presumption would be, that such possession continued until the contrary is shewn, and according to the practice of the Court, the account charging the rents and profits might be brought down to the date of the decree in this

398 * Court, or the Court of Chancery, or the delivery of possession of the dower assigned to the widow.

But the case, as we view it, is not in a condition to enable us to do substantial justice to the parties. There is no legal evidence before us, that dower has ever been assigned under the bill of the 3d of October, or that possession has ever been delivered to the widow. The bill in the case before us is sufficient in its terms to justify both a decree for dower and rents and profits. It will of course be perceived in the present state of the evidence, we should be at a loss to prescribe the terms of any decree which would meet the justice of the case.

The decree on the bill of the 3d of October is neither pleaded in bar, nor are the proceedings under that bill made evidence in the case, so that we could found any decree upon them, or take any other judicial notice of them, than to furnish grounds to enable us, under the Act of Assembly of 1832, chapter 302, to remand the case for further proceedings in Chancery.

As this case must be remanded to the Chancellor for the introduction of such evidence as may furnish a proper foundation for a decree, and as the bill of the 3d of October, and the proceedings under it, may be relied upon as a bar to the recovery of rents and profits, we deem it proper to say, as the question has been fully argued, that we do not consider such proceedings a bar to the complainant's recovery.

It is apparent to us, that the question as to the rights to rents and profits was never adjudged by the Court under the bill of the 3d of October. The right to dower had been assented to in the answer and the complainants had petitioned the Court to appoint a commissioner to lay off the dower, grounded on the assent contained in the answer. After the commissioners had made their return, the case is set down for hearing, and a decree, with the consent of the parties, passes for the widow's dower. Nothing is said on the subject of the rents and profits, although two commissions had issued, and the testimony of numerous witnesses had been taken, having reference to that question. After this decree had thus *been

399 taken by consent, the parties under the bill of the 2d of October, by consent, obtained the decree of the Court for an account, and such equities are only reserved, as may be the subject of exceptions to the account when stated. From such proceedings of the parties we deduce the conclusion, that by mutual agreement a decree was to pass for dower in the one case, and that the question of the right to the rents and profits should be litigated in the other. Unless this were so, it would be difficult to account for the consent with

which both decrees were passed, for the silence of the decree on the bill of the 3d of October, on the subject of the rents and profits, and for the reservation of the parties' equities, on such exceptions as might be taken to the accounts, when stated in pursuance of the decree. *Cause remanded to Chancery.*

THE STATE OF MARYLAND, use of WASHINGTON COUNTY vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.—December, 1842.

The proviso in the 5th section of the Act of 1835, chap. 395, "that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County," though assented to by the Company, does not constitute a case of contract, but a case of penalty, subject as to its enforcement to the will and pleasure of the Legislature.

It is a rule in the exposition of statutes, that the will of the Legislature is to be regarded, and carried into effect, so far as they keep within the limits prescribed to them by the Constitution or fundamental law.

In ascertaining such will or intention, the rule is, that if divers statutes relate to the same thing, they ought to be all taken into consideration in construing one of them.

It is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to one system, and construed consistently.

The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense. (a)

The term forfeit, in common parlance, strongly implies penalty. It is not the language of convention or contract, but is mandatory in its character.

* Although the right of expounding laws belongs to a different department of the Government than the Legislature, still the sense 400 of the Legislature, subsequently expressed upon the subject of laws of doubtful import, is a circumstance not entirely to be disregarded.

An Act or charter of incorporation is nothing more than an offer until consummated by acceptance.

Where by Act of Assembly a penalty or forfeiture is created for the benefit of a particular county of the State, it is competent for the Legislature to release or remit it after the forfeiture has occurred. (b)

(a) See *Canal Co. vs. R. R. Co.* 4 G. & J. 6, note (m).

(b) Affirmed in *State vs. R. R. Co.* 3 Howard, 534, upon the removal of this case to the Supreme Court by writ of error. The case in the text is approved in *Richland Co. vs. Village, &c.* 59 Wisconsin, 591, 598; where it was held that the legislative appropriation to the county of all the funds collected from the sale of licenses, to be used for the support of the county poor, is a mere gratuity, which can be taken away at the pleasure of the Legislature, and that the county has no vested right in such fund.

Such a releasing Act is not an *ex post facto* law, nor a law impairing the obligation of contract.

A county is an integral part of the State, or portion of the body politic, and money received by her, would belong to her as public property, in her public political capacity, to be applied exclusively to the public use. (c)

A county, as a member of the political family, has a right to participate in the legislative council of the State, but the will of the majority, when expressed according to the forms of the Constitution, is obligatory upon her, and to that will, as the rule of her conduct, she is bound, to submit with becoming deference and respect.

A county is one of the public territorial divisions of the State, established for public political purposes, connected with the administration of the government—the money it receives in that character is public property, to be used for public purposes only, and not for the use of its citizens individually. In that relation they would have no immediate interest, and could assert no title. (c) •

No penalty incurred during the continuance of a law can be enforced after its expiration or repeal, without a saving clause or special provision to that effect. (d)

(c) Approved in *Baltimore vs. State*, 15 Md. 462; *Hagerstown vs. Sehner*, 37 Md. 193; *Pumphrey vs. Baltimore*, 47 Md. 152. See also *Regents vs. Williams*, 9 G. & J. 283. In *Hagerstown vs. Sehner*, the Court said that counties and municipalities are “public corporations created by the Legislature for political purposes, with political powers, to be exercised for purposes connected with the public good, in the administration of civil government. They are instruments of government, subject at all times to the control of the Legislature with respect to their duration, powers, rights and property. It is of the essence of such a corporation, that the Government has the sole right as trustee of the public interest, at its own good will and pleasure, to inspect, regulate, control and direct the corporation, its funds and franchises.” In this case it is said that the case in the text is a very instructive one as to the power the Legislature may exercise over the supposed rights of such corporations. In *Talbot Co. vs. Queen Anne’s Co.* 50 Md. 259, the Court said: “A county is one of the public territorial divisions of the State, created and organized for public political purposes connected with the administration of the State government, and especially charged with the superintendence and administration of the local affairs of the community; and being in its nature and object a municipal organization, the Legislature may, unless restrained by the Constitution or some one or more of these fundamental maxims of right and justice with respect to which all governments and society are supposed to be organized, exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization.” And it was there held that the Legislature can, by a mandatory Act, require the commissioners of a county to levy taxes, &c. for the construction of a bridge, located within the limits of another county, where the purpose of the taxation is not only public, but the object to be accomplished is at the same time local in its character, and of special and peculiar interest to the people sought to be taxed. This case is approved in *Washer vs. Bullitt Co.* 110 U. S. 564. Cf. *State vs. Mott*, 61 Md. 297.

(d) Approved in *Keller vs. State*, 12 Md. 325, which case is affirmed in *Smith vs. State*, 45 Md. 49. The repeal of a law imposing a penalty, is of itself a remission. *State vs. R. R. Co.* 3 Howard, 552. By the repeal of an

A contract made by the State, for the use and benefit of one of its counties, is not within the purview of that part of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contract, so far as to prevent the Legislature from releasing it at pleasure, or discontinuing an action brought for its enforcement in the name of the State. (e)

To declare an Act of a co-ordinate department of the Government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional provision, is an exercise of the judicial office of a grave and delicate nature, which never can be warranted but in a clear case. (f)

APPEAL from Frederick County Court. This was an action of debt, instituted by the appellants on the 1st February, 1841, in the *debet* and *detinet*, for the sum of one million of dollars.

The plaintiffs claimed to recover the sum declared for, under the 5th section of the Act of 1835, chap. 395, passed on the * 4th June, 1836, entitled, "an Act for the promotion of Internal **401** Improvement." The first section of which enacted :

"That if the Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad Company, in general meeting of said corporations, respectively assembled, shall approve, assent and agree to the several provisions of this Act, so far as they are applicable to said corporations respectively, and shall severally communicate said approval, assent and agreement, under their corporate seals, and the the signatures of their Presidents, to the Governor of this State, on

Act, without any reservation of its penalties, all criminal proceedings taken under it fall. *U. S. vs. Tynen*, 11 Wallace, 88. Where the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. *Ins. Co. vs. Ritchie*, 5 Wallace, 544; *Ex parte vs. McCordle*, 7 Wallace, 507. But when a right has arisen upon a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute. *Steamship Co. vs. Joliffe*, 2 Wallace, 450. The Appellate Court decides the case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal. *Montague vs. State*, 54 Md. 483.

(e) Approved in *State vs. R. R. Co.* 8 Howard, 534. In such cases, there can be no contract and no irrevocable law, because they are governmental subjects. "They involve *public interests*, and legislative Acts concerning them are necessarily *public laws*. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy in this respect a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require." *Newton vs. Com'rs*, 100 U. S. 559.

(f) Approved in *Baltimore vs. State*, 15 Md. 454; *Com'rs vs. Allegany Co.* 20 Md. 459; *Anderson vs. Baker*, 28 Md. 628.

or before the 1st day of August next, the Treasurer of the Western Shore of Maryland shall subscribe to the capital stock of each of said corporations, the sum of three millions of dollars, and pay for the same in the manner, and upon the conditions hereinafter mentioned; and from the date of the said subscription, the stipulation heretofore made by the Baltimore and Ohio Railroad Company, and so much of the Act of Assembly heretofore passed, restricting the said company from proceeding with the construction of its railroad in the valley of the Potomac River, above Harper's Ferry, until after the C. & O. Co. shall have finished its canal to Cumberland, or otherwise, or the time limited by law for its being completed to said town shall have elapsed, as imposes said restrictions, or is inconsistent with the provisions of this Act, be null and void, and the said railroad company may thenceforth proceed with the construction of its work *pari passu* with, but without preceding the construction of the said canal or its works in the said valley, where the said railroad and canal, or their works, will be in juxtaposition; and, &c.

SEC. 5. *And be it enacted*, That the said treasurer shall be, and he is hereby authorized and directed, to pay from time to time, upon the requisition of the president and directors of said companies respectively, after six months notice, not exceeding one million of dollars to each of said companies, in any year, in the whole not more than three millions of dollars to each of them, out of the money which he shall receive as the par or sum of the State's stocks or bonds that may be issued or disposed of, for the purpose of providing the amount

402 * of subscriptions aforesaid, to the stocks of said companies, and that the said several subscriptions and payments for the said stock of each of the said companies are hereby authorized and directed only upon the condition, that none of the rights and remedies of this State, under any contract now subsisting between the State and either of said companies, shall be in any anywise impaired, waived, relinquished or affected by reason of this Act, or of anything that may be done by either of said companies, in consequence thereof; and the said treasurer shall not make any payment aforesaid, for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors appointed therein, on behalf of this State, shall have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believe in their certificate and statement, that with the subscription by this Act authorized to be made to said company's stock, and with the subscription which the City of Baltimore may have made by virtue of an Act, passed at December Session of the year eighteen hundred and thirty-five of this Assembly, or that independently of any subscription by any other public authority than the City of Baltimore, as aforesaid, and of the Cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest,

the said Railroad Company in their opinion have funds sufficient to complete the said railroad from the Ohio River, by way of, and through Cumberland, Hagerstown and Boonsborough, to its present track near to Harper's Ferry; and it is hereby declared to be, and made the duty of the said company to and they shall so locate and construct the said road, so as to pass through each of said places; which certificate of said directors shall be accompanied by an estimate or estimates of one or more skillful and competent engineers, made out after a particular and minute survey of the route of said road by him or them, and verified by his or their affidavit, shewing that the whole cost of said work will not be greater than the amount of funds the said directors shall certify to have been received by said company, and applicable * to the construction of the said road; Provided, that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County. **403**

The plaintiff declared upon the Act of 1835, and alleged, that the defendants had not so constructed and located their road as to pass through Cumberland, Hagerstown and Boonsborough, as directed by the said 5th section. Errors in pleading were waived.

The defendants pleaded—1st. *Nil debet*.

2nd. That since the last continuance, the Legislature of Maryland had passed the following law, to wit:

An Act to repeal certain parts of the Act, entitled, an Act for the promotion of Internal Improvement, passed at December Session eighteen hundred and thirty-five, chapter three hundred and ninety-five.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That so much of the fifth section of the Act, entitled, an Act for the promotion of Internal Improvement, passed June four, eighteen hundred and thirty-six, chapter three hundred and ninety-five, as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road, so as to pass through Hagerstown and Boonsborough, be and the same is hereby repealed; and that the forfeiture of one million of dollars, reserved to the State of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not locate the said road, in the manner provided for in that Act, be and the same is hereby remitted and released, and any suit instituted to recover the same sum of one million dollars, or any part thereof, be and the same is hereby declared to be discontinued, and of no effect.

SECTION 2. *And be it further enacted,* That the State of Maryland hereby reserves the right, if after the completion of the said railroad to the Ohio River, the Legislature should deem it expedient to require the said Baltimore and Ohio Railroad Company to construct a

404 lateral road or branch from some convenient * point of the main stem up the Antietam valley to Hagerstown; provided, the said lateral or branch road can be constructed at a cost not exceeding the sum of three hundred and fifty thousand dollars, including damages for the right of way.

And thereupon pray judgment, if, &c.

The parties then filed a statement of facts, with an agreement, that the County Court might enter a judgment *pro forma* for the defendants. The questions decided by the Court of Appeals render it unnecessary to publish the statement of facts.

The County Court rendered final judgment for the defendants and the case was brought to this Court upon appeal by the plaintiffs.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

Jervis Spencer, for the appellant, contended—1. The Act of 1835, chap. 395, sec. 5, by force of the words, "Provided, that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County"—the same accepted by the company is a contract. The case 4 G. & J. 128, shows the rules on this subject. The words, "approve, assent and agree to," in the first section of the Act of 1835, as the condition to give effect to the whole Act, make a contract on the part of the appellees.

2. Washington County is a party to that contract, she is really and beneficially interested. It is for her peculiar benefit. It resembles an agreement made between A and B, for the benefit of C, who may sue *suo jure*. A consideration need not be paid by the beneficiary. A benefit moving to the Railroad Company is sufficient to bind her at law. And there is a consideration as to Washington County. The relation between her and the State, is like that of parent and child. The State, as parent, is the guardian of the counties. No consideration, * however, is necessary in this action. The

405 rules of construction are generally applied alike to all descriptions of contracts. 4 G. & J. 151. The case of *Green vs. Biddle*, 8 Wheaton, 1, is conclusive upon the question at bar. The Act of Kentucky, attempting to overrule rights vested under the compact between Virginia and that State, was held void.

Where a trust is created for the benefit of a person, though without his knowledge at the time, he may affirm the trust, and enforce its execution. *Neilson vs. Blight*, 1 John. Cas. 208.

An assignment may be made of a contract without consideration. The State may assign at pleasure to Washington County, and that county pays a consideration, for she pays a tax under the Act of 1835, or rather, is liable to pay it. If the State had not interposed

under the Act of 1840, no question could have been raised under the Act of 1835.

3. The forfeiture in the Act of 1835, is in no sense a penalty. It is not for any criminal prohibited act amounting to a public offence. It is introduced *in terrorem*, but is a sum to be paid for using the license given by the Act, as a compensation to the injured party. *Green vs. Biddle*, 8 *Wheat.* 89; 2 *Poth. Oblig. Evans' notes*, 81.

4. That by the use of the license by the company, Washington County acquired a vested right in the sum stipulated to be paid. *Whittington vs. Polk*, 1 *H. & J.* 246; *Providence Bank vs. Billings & Pittman*, 4 *Peters*, 561; *Canal vs. Railroad Company*, 4 *G. & J.* 142.

5. That to take away this right from Washington County would be inequitable, unjust, and contrary to the first principles of the social compact; and therefore the Act ought to be so construed, if possible, as to avoid that result, and it may be so construed by confining its operation to whatever right this State had, if any. The State might release her own power over the matter, leaving in force the right of the county. *McMechen vs. Mayor, &c., of Baltimore*, 2 *H. & J.* 41; *Caldar and Wife vs. Bull and Wife*, 3 *Dallas*, 387; *State of New Jersey vs. Wilson*, 7 *Cranch*, 166; *Fletcher vs. Peck*, 6 * *Cranch*, 130; *Town of Pawlet vs. Clark*, 9 *Cranch*, 335; *Hampshire vs. Franklin*, 16 *Mass.* 84; 1840, *ch.* 260; *Moseley Rep.* 43; *Winch vs. Kirley*, 1 *Term Rep.* 358; *Legh vs. Legh*, 1 *Boss. & Pull.* 447; *Carter vs. United Ins. Co.* 1 *J. C. R.* 463; *Owings vs. Piet & Low*, 5 *G. & J.* 134; 1 *Wheat.* 233; *Eels vs. Finch*, 5 *John. Rep.* 193; *Andrews vs. Bleecker*, 1 *John. Cases*, 411; *Wardell vs. Eden*, 2 *John. Cases*, 121; *Kiersted vs. State, use of Costello*, 1 *G. & J.* 231. **406**

6. If otherwise construed, it is repugnant to the State Constitution, and void.

7. In the same view it is repugnant to the Constitution of the United States, and void.

Price, in continuation, for the appellants—The case is of importance from the amount involved, the dignity of the parties, and the novelty of the questions. It affects Washington County, an important member of the State, on the one hand and one of the most extensive chartered companies of the State, on the other. The State exercises authority over both, and all must notice that the inquiries here are of grave interest. We are obliged to go down deep into the foundation of civil government, and it is fortunate for all, that we may here examine them calmly. In this place, government is no mystery, each citizen may enquire into it. I prefer a claim of right on behalf of Washington County, one of perfect obligation. The Court have no favors to confer. They must declare the right. The history of our right is brief. The claims grows out of the Act of 1835. A grant of three millions was made by the State, on condition, to the appellees; a part of the condition was to construct a road through Washington County; another condition was a forfeiture of a million

of dollars to Washington County, in case the road was not constructed. To this was superadded the necessity of consent by the appellees—the appellees assemble and approve and agree to the provisions of the Act of 1835. This was done in the form and manner prescribed. An agreement was made as declared by the Act of 1835. You cannot withdraw that stipulation from the law, and so destroy its symmetry. * It was a general scheme. It contained **407** grants to general schemes of improvement. All parts of the State were to share and participate. The Act was full of compensation and compacts from first to last.

There was no provision of that Act which could be carried out independently; they were interlaced, each the consideration of the other. No compensation was granted, but as the co-relative of some provision in the same Act. See the 8th section. None should begin until all were ready, and this affected several schemes of improvements. A million of dollars was held sacred, and faithfully pledged to internal improvements on the Eastern Shore, at any rate. This is a compact—bargain if you like. The basis of a scheme of burdens and benefits to be distributed. Hereafter the Eastern Shore may claim her million. Such bargains are fair, if open, and equitably conducted. People may so agree. It is a partnership of profit and loss, and included in one contract. Modern legislation is full of such compacts. Maryland covenanted as to the Western Lands, and on this condition came into the Union. She was first guarantied. So as to slaves, which affected both representation and direct taxation under the Constitution of the United States. Communities rally on such points, and there is no want of morality in the mode of settling the question. Baltimore is not the whole State. The Act was to benefit her, and hence the equivalents given. It was all right, if adjusted openly and honorably. If wrong, the Baltimore and Ohio Railroad Company is not here to read us homilies. She obtained her three millions as the equivalent of other grants. She cannot chide this as sectional or sordid legislation. She was to agree to it, and all its provisions. She might refuse and defeat the law. It depended upon her assent to become a law. That assent perfected the Act of 1835. The law was not passed in haste. It was proposed. The Legislature adjourned in April, and re-assembled late in May. The members went home—saw their constituents—held a sort of family council—came back, and thus sanctioned the Act of 1835. They even proclaimed the mode in which they would levy taxes, if necessary; they awarded compensation * in various instances. All **408** considerations as to the moral of the Act apply with equal force to both parties here. The same principles must apply throughout. The Legislature of 1835 had no design to perpetrate a fraud. or to practice a joke, and no disguise. Her proposals were accepted. They proposed a duty to be performed towards Washington County. Its failure was accompanied with a forfeiture. The means of dis-

charging that duty were provided. The Legislature could do no more for Washington County, yet the possible departure of the railroad from Maryland was anticipated, and now that company is as much bound to pay, as to go on with her great work.

What did the Legislature intend? Intention and construction are synonymous. We do not require what the B. & O. R. R. intended. Can it be said as respects W. County, that this Act was a fraud and a jest? Take that stipulation away, and the system of contemplated improvements is destroyed. This is the worst sort of repudiation. If you can take away this million, why not the entire loan? Why not repudiate the bonds given to R. R. Company? There is no compensation proposed to Washington County for the loss of the road. The company went into Virginia, and there expended large sums of money, which cannot be recalled. This is submitted to, and Virginia compels them to go on, and not to enter their State west of Cumberland. How was it that Virginia exacted such results? It looks contrivance. It was asked for as a means to use before the Legislature of Maryland. They made a case of *vis major*. I do not make the charge, but it looks like it, and when I speak to the morals of this controversy, I am at liberty at all points of the case, and the conduct of the parties concerned.

Is the Act of 1835 a contract or not? A State may contract by legislation, with a State, individual, or a corporation. This rule is admitted on all hands. Legislation and contract are different in their natures. The Legislature contract for the State, and not for the Legislature. In contracts they act as agents for the State. A contract is guarantied by the Constitution of the United States. A contract binds *per se*. A State cannot break a contract. It is sacred from State power. * The Act of 1835 embodies terms of contract between the State and the B. & O. R. R. Co. Is the 409 stipulation in favor of Washington County, a contract or not? Grant that it is a contract, and there can be no further difficulty in this case. Washington County is a party to that contract. The R. R. Company was required to agree; upon that condition the Treasurer subscribed to the stock of certain companies. The premium in favor of W. County was not a new thought in 1835. That county was always regarded in the system of Maryland improvements. The assent of the company made a contract. *Neilson vs. Blight*, 1 *John. Cas.* 205; *Moses vs. Murgatroyd*, 1 *J. C. R.* 129.

The county may avail herself of the contract, though not made with her. 1 *Kent Com.* 391, 392.

The prohibitory clause in the Constitution of the U. States extends to contracts, with trustees, for third parties, though the trustees is not benefited.

Maryland proposed a contract by the Act of 1835. *Canal vs. Railroad Company*, 4 *G. & J.* 129.

The assent makes a contract. The company assented without qualification to the contract as tendered her. It covers all the stipulations in that law, and makes an entire contract. Was there any consideration for it? If accepted under seal, it is a specialty, and imports a consideration. So if the acceptance made a contract. 2 *Black. Com.* 345.

There was a grant of three millions, which is a consideration, and enough too. This was received and held by the company. The law forms the contract, and shows its terms. It was made by the Legislature as the contracting party. The statute is a specialty. *Com. Dig. Tit. Debt, A, No. 4*; 1 *Saunders Rep.* 38; *Cro. Chas.* 513.

No consideration necessary to create a trust declared on the face of the instrument, making the trust. 24 *Law Lib.* 36.

Here there was a consideration of damage to W. County, from failure of road through the county. Old roads and improvements destroyed. It is a meritorious motive, property destroyed should be paid for.

410 * The penalty imposed by the Act of 1836, is not for a political offence, nor for a criminal act, nor *in terrorem*. It arises upon contract, and is stipulated damages, intended to be paid. The Act of 1840, chap. 260, confirms this idea. It uses the words, remit and release; hence, the penalty had accrued, or it could not be released.

In the construction of laws, we ask what the intention of the Legislature was? *Plowden*, 465; 2 *Evan's Poth.* 79, 81, 82, 83.

It is then stipulated damages, and all is recoverable or nothing. There is no power to break the contract. The Legislature did not intend to do more by the Act of 1840, than release public rights; more is a nullity. It is violence and not law. This is a vested right, and not to be disturbed. It is contrary to natural justice to impair a contract. The Legislature cannot interfere; it cannot unmake a contract. The sovereignty is limited; we have a written Constitution, and not an absolute government. All is compact. Every power comes from agreement. *Regents University of Md. vs. Williams*, 9 G. & J. 408, 409.

It is against the social compact and natural justice, to take away vested rights. *Town of Pawlet vs. Clarke*, 9 *Cranch*, 292.

To dismiss a suit is a judicial power. *Calder vs. Bull*, 3 *Dallas*, 387.

The Act of 1840 is against the Constitution of the United States. An Act rescinding a contract is repugnant to it. *Fletcher vs. Peck*, 6 *Cranch*, 136.

Statutes are not retrospective. The law-giver cannot alter his mind as to a vested right. *Dartmouth College vs. Woodward*, 4 *Wheat.* 576.

Grants are construed as contracts executed or executory. *Regents of University vs. Williams*, 9 G. & J. 365.

Then, as to the power of the trustees to strike off the suit in a Court of law. This is traditional law. The Courts will protect the rights of equitable plaintiffs against a legal plaintiff; will examine into the right, and that established, they will not disturb it. The assignee uses the name of the assignor, as an incident of the transfer, and Courts protect assignments. Can a naked trustee, a party in that interest, dismiss the suit? Here the State is a mere trustee, and we have no remedy but in her name.

Nelson, for the appellee: I propose to maintain three propositions:

1. That the proviso of forfeiture in the Act of 1835, imposes a penalty, and is not in the nature of contract.

2. If a penalty, the Legislature could, and did remit it by the Act of 1840.

3. If a contract, the Legislature was competent to release it, and did release it by the Act of 1840.

The corporation was a private one; but the grant was for a public benefit alone, and of course is under public control. This position is well maintained everywhere. 2 *Black. Com.* 436, 437. Penalties are to be recovered in popular actions. Where there is an informer, the King can only remit before action brought, but Parliament may at any time. 1 *Sir Wm. Black.* 451.

The Legislature may repeal the penalty at any time. The power to remit resides in the sovereign will, the Legislature. Public interest and police regulations are confided to the Legislature. 1 *Cranch*, 103, 104; 5 *Cranch*, 281; 6 *Cranch*, 329, 203; 2 *McCord*, 1.

If the law be repealed, the party is not punishable. The law must remain in the same state at time of action instituted, as at time of judgment. 2 *Bayley*, 564; 1 *Missouri*, 235.

The State is a trustee for Washington County, and may dispose of the penalty at pleasure. She may take the money of* any county before or after it is due. She may alter its direction, 414 or release it at pleasure, before or after judgment. A county is but a part of the political power of the State.

The Legislatnre may repeal penalties and defeat judgments founded upon them. *Breeze*, 114; 1 *Marsh.* 465; 1 *Stew. Alab.* 347; 2 *Stew. Alab.* 160; *Adam New H.* 61.

Suppose the Act of 1835, imports a contract, is the repealing law constitutional?

The cases cited could not apply. Much here depends on the character of the parties. The power of repeal relates to that character. It is not the case of a citizen of Washington County. But it is the community of Washington County in their public character as public agents—as a political corporation. Its power is not inviolable. This is not a case within the Constitution of the United States in regard to contracts. A county is created for municipal and political ends; to promote general interests in a particular mode, but it has no being

independent of the State, who creates and may annihilate it. 9 *Cranch*, 43; 4 *Wheat*. 629, 659, 693, 694; 1 *Missouri*, 239; 13 *Wendell*, 337, 325.

The case of the *Mayor and City Council of Baltimore vs. Robert Lemmon*, June Term, 1838, by which the auction duty law, taking away the fund from the city and transferring it to the State was sanctioned, forecloses this question and fully sanctions the Act of 1840.

F. A. Schley, also for the appellees. The Act of 1840 was passed deliberately, and is not to be assailed lightly. If the constitutionality of that Act is doubtful, this Court will maintain it. 6 *Cranch*, 128.

If doubtful on that point, it is a controlling principle in favor of the Act. 4 *Peters S. C.* 549; 3 *Dallas*, 394; 1 *Bald. C. C. R.* 74; 3 *Sumn.* 120; 2 *Gallison*, 554, 5.

Many cases of contract have been decided not to be within the Constitution of the United States. 4 *Wheat*. 643, 644; *Bald. Con. Views*, 141; 4 *Peters*, 563; 3 *Peters*, 289.

415 * A contract to be within the protection of the Constitution of the United States, must be express; an implied contract is not within it.

But in the Act of 1835, which was for the general improvement of the State, there was no contract in the particular case relied on. The assent to the whole law does not make a contract in any case except where the Act intended to make a contract. The rules which relate to the construction of statutes sanction these views. *Duarris on Stat.* 707; 8 *Barn. & Cres.* 74; 5 *Rep.* 119.

In the 5th section the language is, you shall forfeit. This indicates penalty. The enormous sum is *in terrorem*. It is not a vested interest as in contract. It is also a forfeiture to the State, and in statutes the word forfeiture is ever used in connexion with fine and penalty. The Act of 1840 unlocks the legislative mind, and shows that penalty only was designed by the Act of 1835. Then again, if a contract, it is with the State, and the power which originated, may release it. Washington County paid no part of the consideration. The commissioners who assert the right to the fund here, are but arms of the State; a public corporation; a political body. Establish them to be a municipal corporation, with public powers, and there is an end of the question. In the case of the dissolution of a public corporation, Chancery interferes only to protect private property under its care. *Angel on Corp.* 8, 40; 9 *G. & J.* 397.

The community of Washington County could not use this money without legislative direction. The forfeit was to Maryland. The use and application of the fund must still be defined. How would the county take this money from the treasury?

The delegated power to sue may be revoked by the Legislature at any time before judgment. 2 *Bayley*, 584; 3 *Wheat*. 319; 10 *Wheat*. 289, 304.

The Levy Courts or commissioners of counties can only receive money by authority of law. All their powers are express, and all subject to legislative revocation.

R. Johnson, also for the appellees: 1. The Act of 1835 constitutes a penalty.

2. If a penalty, then under the control of the Legislature.

3. If a contract, then the party for whose use the contract was entered into is not a party to it; or if a party, has no such interest as is protected by the Constitution of the United States, or State of Maryland, or the first principles of the social compact.

4. If a contract, then at law under the control of the Legislature of Maryland, because of the public character of the *c. q. use*—Washington County—without question so far as that county is concerned.

He cited *Canal Co. vs. R. R. Co.* 4 G. & J. 1; *U. S. vs. Morris*, 10 Wheat. 301, 304, 292; 4 Wheat. 629, 695; 2 G. & J. 208, 206; 9 Cranch, 42; 13 Wendell, 337; 1 Breeze, 315, 120; *Missouri*, 238, 239; 2 Peters, 411; 3 Peters, 389; 4 Ib. 503; 8 Ib. 100.

John Sergeant, in reply, cited 9 Cranch, 994; 16 Mass. 84.

STEPHEN, J. delivered the opinion of this Court. This is an action of debt, instituted in the name of the State of Maryland, for the use of Washington County, to recover the sum of one million of dollars, claimed by the county from the Baltimore and Ohio Railroad Company, for an alleged violation of contract contained in one of the provisions of its charter.

In bar of any recovery in this suit, the appellee has pleaded, that nothing is due to the county; and also, the Act of Assembly annulling the obligation and releasing the forfeiture, in virtue of which the said sum of money is alleged to be due.

The controversy between the parties is one of considerable magnitude, not only as regards the sum involved in the litigation, but on account of the aspect it has assumed, as a *question involving grave considerations of constitutional law. The case has **431** been argued with great legal learning and ability by the distinguished counsel employed to advocate the cause of the respective parties, and the Court have derived no small degree of assistance in coming to the result at which they have arrived, from the light which has been shed upon the subject in the course of the discussion.

On the part of the appellant, it has been treated in the course of the argument as a clear case of contract, covered by a constitutional sanction, and therefore inviolable by legislative interference; on that of the appellee, it has with a confidence seemingly and no doubt really, equally sincere, been treated as a clear case of penalty, and therefore subject to legislative control, and free from constitutional difficulty.

We have considered with that care and attention which the importance of the subject demanded, the arguments which have been urged on both sides of the question, and have come to the conclusion that, according to the true construction of the Act of the Legislature from which the controversy has arisen, it is not a case of contract, the obligation of which has been impaired by legislative interference, but a case of penalty, and therefore subject, as to its enforcement, to the will and pleasure of the Legislature. It is a rule in the exposition of statutes, that the will of the Legislature is to be regarded, and to be carried into effect, so far as they keep within the limits prescribed to them by the Constitution or fundamental law, and in ascertaining such will or intention, the well established rule is, that "if divers statutes relate to the same thing, they ought to be all taken into consideration in construing any one of them." For this principle, see 6 *Bacon's Abr.* 382. And so far has this rule been carried, that it is held to apply, although one of them may have expired. For which doctrine, see also the same book, 383, where it is said—"it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently." Adopting this rule in the case now before this Court, as

432 a *legitimate test or standard by which to indicate the legislative mind, we think the inference will be found to be well warranted, that the duty imposed upon the appellee of locating the road through Cumberland, Hagerstown and Boonsborough, was intended to be enforced, not by the obligation of contract, but by the sanction of penalty alone. The language of the 5th section of the Act of 1835, chap. 395, is as follows: "and it is hereby declared to be and made the duty of the said company to, and they shall so locate and construct the said road, as to pass through each of the said places;" "Provided, that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County." It is another well settled rule in the construction of a statute, that "the words are to be taken in their natural and ordinary signification and import, and if technical words are used, they are to be taken in a technical sense." 1 *Kent's Com.* 462.

Applying these principles of interpretation to the case before us, and we think the conclusion is well warranted, that penalty and not contract was in the contemplation of the Legislature when they enacted the fifth section of the Act of 1835, upon which this suit has been instituted, in case of non-compliance with the requirements of the law, the company is to forfeit one million of dollars to the State, for the use of Washington County. The term forfeit, in common parlance, strongly implies penalty, and such appears to be the import ascribed to it by lexicographers of the highest respectability, in

giving with precision and accuracy, the meaning of our language. Mr. Webster defines the word forfeit to be that which is forfeited or lost by neglect of duty, or in other words, a fine, a mulct, a penalty. The language, moreover, is not that of convention or contract, but is mandatory in its character. It is the language of the creator to the creature, enjoining a duty to be performed, and imposing a penalty or forfeiture for disobedience or neglect. It is therefore, we think, in every view and aspect under which it could be considered, penal and not *conventional, according to its sound and true interpretation. In this sense it appears to have been understood by the Legislature when they passed the Act of 1840, chap. 260. In that Act they say, "that so much of the 5th section of the Act of 1835 as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough, be and the same is hereby repealed; and that the forfeiture of one million of dollars reserved to the State of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in that Act, be and the same is hereby remitted and released; and any suit instituted to recover the same sum of one million dollars, or any part thereof, be and the same is hereby declared to be discontinued and of no effect." In this law, the forfeiture to the State is emphatically termed a penalty, imposed for not locating the road as prescribed by the Act of 1835, and although the right of expounding laws belongs to a different department of the government, and is not embraced within the sphere of the legislative power, still the sense of the Legislature upon the subject of laws enacted by themselves, when of doubtful import, is a circumstance not, we think, entirely to be disregarded. In speaking of the rule that several Acts in *pari materia*, and relating to the same subject, are to be taken together and construed as one system, Chancellor Kent says—"the object of the rule is to ascertain and carry into effect the intention; and it is to be inferred, that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." See 1 *Kent's Com.* 463, 464. Much stress was laid in the course of the argument upon the first section of the Act of 1835, which requires the assent of the company to the provisions of that law, as indicating that the fifth section should be construed to operate as contract, and not as penalty. The term assent, mentioned in that section, it was said, is a word peculiarly appropriate to contract, and not to penalty or forfeiture. This is certainly true as a general proposition, and need not be *controverted to elude or avoid the force of the argument upon the present occasion. The assent of the company was essential to give to the law a binding and obligatory force; the principle being well settled, that an Act or charter of incorporation is nothing more than an offer until consummated by acceptance,

and in that sense and for that purpose it was manifestly used in the first section of the Act. It was assented to in that sense alone which it ought to receive, according to its sound and genuine interpretation; and to give to the term a different import, would be a perversion of the purpose for which it was adopted. As a further proof that the fifth section ought to be construed as creating a penalty and not contract, it may be useful to refer to the ninth section of the same Act, where the language of contract is clearly and unequivocally adopted. The terms there used are peculiarly appropriate for that purpose, and are so expressive or significative of that intent, as to leave not a shadow of doubt upon the subject. The expression there used, "stipulate, agree and bind the said company," speak a language too explicit to be misunderstood, and remove every shadow of doubt as to the intent. Nor is this the only instance in which the Legislature have spoken an unequivocal language, when they intended to bind the company by the solemnities or obligation of contract. In the third section of the Act of 1827, chap. 104, expressions of similar import, are carefully used to create the obligations of contract instead of penalty; and that too in relation to the same subject, as the one embraced by the fifth section of the Act of 1835, out of which this controversy has arisen, and if it was designed to deal with the company in the same manner, and to impose upon them the same duties and obligations, to be fulfilled under a similar responsibility in the 5th section of the Act of 1835, it is difficult to conceive, why the appropriate language to execute that intent was abandoned, and terms of more equivocal import adopted. In the third section above referred to, after specifying certain conditions, upon the performance of which, the treasurer should be authorized to subscribe on behalf the State, the Legislature insert the following proviso:

435 * "And provided also, that the President and Directors of the said company shall agree so to locate said road, that it shall go to, or strike the Potomac River at some point between the mouth of the Monocacy River and the Town of Cumberland, in Allegany County, and that it shall go into Frederick, Washington and Alleghany Counties; and provided also, before such subscription is made, the President and Directors of the said company shall, in writing to be approved by the Attorney-General, bind the said company to allow the State to subscribe for the remaining five thousand shares on the same terms, at any time during the session of the next General Assembly." Here it is not made the duty of the company to locate the road in a particular direction, under a forfeiture for non-performance or neglect, as in the 5th section of the Act of 1835; but in the language of contract, they are made to agree so to locate it, that it shall go into Frederick, Washington and Alleghany Counties, and in reference to the State's right of future subscription, it is still more apparent with what anxious solicitude the solemnities and binding efficacy of contract are preserved in the same section; upon

that subject, the company was to be bound by a written instrument, which was not to be deemed satisfactory until it had received the sanction of the law officer of the State. It is moreover to be observed, that when at a subsequent period, it was found necessary, in consequence of a conflict of route with the Canal Company, to release conditionally the Railroad Company from their contract, as entered into by the Act of 1827, the law by which they were discharged, holds the same language, and speaks of it as a condition or agreement from which they were released.

If then, the duty imposed by the 5th section of the Act of 1835, was intended to be enforced by penalty, and not by contract, the next question to be considered is, were the Legislature competent to release the penalty in the manner they have done, by the Act of 1840, chap. 260 ? In the exercise of such a jurisdiction, the Legislature are restrained by no constitutional prohibition. The releasing Act could not be deemed an *ex post facto* law in the sense of the Constitution, nor could it be * considered as impairing the obligation of a contract, indeed it was not attempted to be impugned 436 upon either of these grounds in the course of the argument, but was exclusively assailed upon the ground that the Act of 1835 provided for a case of contract, and not of penalty; and that therefore, the Act of 1840 was a violation of the constitutional inhibition, forbidding the State Legislatures from passing any law impairing the obligation of contracts. The money being forfeited to the State as a penalty for the use of Washington County, one of the constituent elements of the State, the Legislature had an unquestionable right to remit it. Washington County is an integral part of the State, or portion of the body politic, and the money, if received by her, would belong to her as public property in her public political capacity, to be applied exclusively to the public use. As a county, she stands to the State in the relation of a child to a parent, subject in all respects to its jurisdiction and power, as well as entitled to the benefits of its fostering care and protection. As a member of the political family, she has a right to participate in the legislative councils of the country; but the will of the majority, when expressed, according to the forms of the Constitution, is binding and obligatory upon her, and to that will, as the rule of her conduct, she is bound to submit with becoming deference and respect. Several instances were referred to in the course of the argument, where it appears that a similar jurisdiction has been exercised by some of our sister States, but it is deemed unnecessary more particularly to refer to them. If then the Act of 1840, releasing the penalty, was a legitimate exercise of power, and it was within the constitutional competency of the Legislature to pass it, what was the effect of that law upon the rights of the plaintiff, as to the further prosecution of her suit, and did it operate to bar the recovery of the penalty which was remitted by it ? Upon that part of the case we think no doubt can be entertained, as

all the authorities referred to seem to speak one uniform language upon the subject; they all agree that no penalty incurred during the continuance of a law, can be enforced after its expiration or repeal, without a saving clause or some * special provision to that effect. In 1 *Kent's Com.* 465, the principle is stated to be that, "if an Act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the Act expires, or be repealed. Though the offence be committed before the expiration of the Act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose." To the same effect see 5 *Cranck*, 283, where Chief Justice Marshall, in delivering the opinion of the Court says—"The Court is, therefore, of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by the statute." Many other authorities might be referred to in support of the same principle, but the rule seems to be so well settled, that it is deemed unnecessary to do so. If this, therefore, is to be deemed a case of penalty, and not one of contract, the Act of 1840 seems to operate as a complete bar to the plaintiff's recovery, and the judgment of the Court below ought to be affirmed.

But supposing that the views heretofore expressed upon the merits of this controversy are not well founded, and that it is to be deemed a case of contract and not penalty; is it a contract coming within the purview of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts, and was the Act of 1840 therefore a nullity? In order to arrive at a just conclusion upon that subject, it is material to consider who are the contracting parties, and in what relation does the *cestui que use* stand to the legal plaintiff upon the record? The contracting parties are the State on the one part, and the railroad company on the other. The consideration of the contract were the franchises and privileges derived by the company from the State, and the *cestui que use* is one of the counties of the State, claiming an interest incidentally in her political character and capacity, * in virtue of

438 one of the provisions contained in that contract? The State, for reasons which she deemed sufficient, has thought proper, by an Act of her Legislature, to annul the contract and release the claim of the *cestui que use*, which this action has been instituted to enforce; and it is now contended on the part of the appellant in support of it, that such legislative Act is a nullity, because it violates that great moral sanction of the Constitution, which declares, that no State shall pass any law which impairs the obligation of contracts. To declare an Act of a co-ordinate department of the government an un-

warrantable assumption or usurpation of power, because it is a violation of a constitutional prohibition, is an exercise of the judicial office, of a grave and delicate nature, which never can be warranted but in a clear case: but however painful and unpleasant the task may be, it is a duty enjoined upon the Courts of justice sometimes to execute it, under the solemn sanctions of an oath, which they are not at liberty to overlook or disregard. In the case, however, which we now have to decide, we have no such duty to perform, because we think the Legislature have not transcended their constitutional limits in passing the Act of 1840, by which they released the claim of the plaintiff, and discontinued the action which was brought to enforce it. Washington County, by which the claim is attempted to be enforced, is one of the public territorial divisions of the State, established for public political purposes, connected with the administration of the government. In that character she would receive the money as public property, to be used for public purposes only, and not for the use of her citizens in their private individual characters and capacities. In that relation they would have no immediate interest, and could assert no title. She is one of the instruments of the Government, invested with a local jurisdiction to aid in the administration of public affairs, and may be emphatically termed a part of the State itself. If then it be public, and not private property, it would seem to be completely at the disposal of the government, and the Act of 1840 was nothing more than a rightful exercise of legislative power. In the forty-fourth * number of the *Federalist*, a work of distinguished merit and ability, written principally by **439** two eminent members of that Convention of enlightened men, by whom the Constitution of the United States was formed, Mr. Madison, speaking of that principle contained in it, which prohibits the States from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, uses the following language as indicating his understanding of the views of the Convention when they adopted that prohibitory clause of the Constitution—"The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights." In 2 *Dallas*, 320, Judge Patterson, who was also a member of the Convention by which the Constitution was formed, speaking of the import of the same constitutional restriction upon State legislative power, expresses himself in the following terms: "Over public property they have a disposing and controlling power, over private property they have none, except perhaps in certain cases, and those under restrictions; and except also what may arise from the enactment and operation of

general laws respecting property, which will affect themselves as well as their constituents." In 2 *Kent's Com.* 275, Chancellor Kent says: "Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages, and the whole interest in them belongs to the public." In the *Dartmouth College Case*, the Chief Justice, in delivering the opinion of the Court, observed, that the provision in the Constitution never had been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a Court of justice. Dartmouth College was a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with the government, and its funds * were bestowed

440 by individuals on the faith of the charter, and those funds consisted entirely of private donations. The corporation was not invested with any portion of political power, nor did it partake in any degree, in the administration of civil government. A contract of that kind he held to be within the purview and protection of the Constitution. In 9 *Cranch*, 52, Mr. Justice Story, in delivering the opinion of the Court, says: "In respect also to public corporations, which exist only for public purposes, such as counties, towns, cities, &c., the Legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the use, of those, for whom, and at whose expense, it was originally purchased." In 9 *G. & J. Rep.*, 401, this Court express themselves to the same effect, where they say: "Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control and direct the corporation, its funds and franchises. That is of the essence of a public corporation." Again, in page 397 of the same book, it is said: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the Legislature, and its members, and officers of the government for the administration or discharge of public duties, as in the cases of cities, towns, &c."

In 1804, the Justices of the Levy Courts of the respective counties were incorporated, and all property belonging to any county, or appropriated to any county use or purpose, was vested in them for the benefit of the county; and by an Act passed in 1829, ch. 21, commissioners are directed to be chosen biennially by the voters of the County of Washington, who are likewise incorporated, and in whom the same powers and privileges are vested, as were given to the Justices of the Levy Courts by the Act of 1804, and all property belonging to the county or appropriated to its use, is in like manner

441 vested in * the said commissioners. The money then for which this suit has been brought, if recovered, would be vested in

this body corporate, as a public corporation, for public or county purposes, and would not be private property, belonging to the citizens of the county in their individual rights or private capacities. It would be held by the commissioners as public property given by the State, to be used only under legislative authority, for public purposes, and be subject in their hands, in all respects whatsoever, to the controlling power and jurisdiction of the Legislature.

It is a circumstance moreover worthy of consideration, as indicating the public character of these commissioners, and the official relation in which they stand to the government as public agents, that the Act of incorporation provides, that in case of death, resignation, refusal to act, or removal from the county, the vacancy so occasioned, shall be filled by the Executive of the State, until a new election shall take place.

To put the question in a still stronger light, let it be supposed for the sake of the argument, that the one million of dollars had been appropriated as a forfeiture to the use of the Eastern Shore of Maryland, one of the two great divisions of the State, could it be contended with any semblance of reason or propriety, that a remission of the penalty by the State would not be a legitimate exercise of legislative power? Or to put the question in a still clearer point of view, suppose the money had been appropriated to the use and benefit of all the counties of the State, designating each of them by their respective names, (which would be substantially to the use of the State,) could it be successfully maintained, that the government, if the public good required it, would have no right to remit the forfeiture? And if it could be lawfully done, where the interests of all would be involved, upon what principle of sound reasoning could it be urged, that the same power and jurisdiction would not exist, where the rights of one alone would be concerned? If the interest of Washington County could be merged in the public good in association with her sister counties, without a violation of constitutional law, where * reasons of State policy required the sacrifice to be made upon the altar of general welfare, it is difficult to conceive upon what ground of fair reasoning a similar power could be denied to exist, where her interest alone, in her separate capacity, should be offered up as a victim, to attain the same object. A jurisdiction which would be rightfully exercised in the one case, could not be wrongfully exerted in the other.

Under every view, therefore, which we have been able to take of this case, we think that the claim of the appellants is wholly groundless and untenable, and that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

RICHARD H. MILES vs. FRANCIS KNOTT'S Lessee.—December 1842.

The misrecital in the writ of *feri facias* of the judgment, on which it is founded, does not render it inadmissible as evidence for the party who purchased under it.

The failure to recite the judgment accurately in the writ of *fi. fa.* does not render the process void.

It is erroneous process, but such an error does not affect the title of a purchaser acquired under it. (a)

The Act of 1778, chap. 21, sec. 7, gives plaintiffs a year after a stay entered on the docket to issue execution.

The Act of 1823, chap. 194, gives three years from the date of the judgment, and not from the expiration of the stay, to issue execution.

If there be no stay on a judgment, or a stay not exceeding two years, execution must be taken out within three years from the date of the judgment. If the stay be for three years, or a longer period than three years, the execution may be taken out within a year from the expiration of such stay, according to the Act of 1778, chap. 21.

So far as the right to issue execution is concerned, the judgment of supersedeas dates from the day of its confession, and not from the day of its being filed.

No execution can rightfully issue on a supersedeas judgment after three years from its date, without a *scire facias* to revive it.

Whether a title would pass to a purchaser under an execution issued upon a supersedeas judgment, more than three years after its date, depends upon the question whether the writ was void or voidable. If void, no

443 title could * pass. If voidable, the purchaser acquires a title. Such process is only voidable. (a)

The question of irregularity in the issuing of a writ of execution can never be discussed collaterally in another suit. (c)

The copy of an account of the defendant, passed against a deceased person, certified by the register of wills, under his seal of office, is not evidence against him to establish the facts set out upon the face of such account. The law does not authorize such vouchers to be recorded, nor are they left in the custody of the register.

In an action of ejectment against the defendant in a judgment, whose land had been levied upon and sold to pay his debt, by the purchaser thereof, he is not called upon to show title out of the State. All that is required on the part of the plaintiff, is the production of the judgment against the defendant, the *feri facias*, and proof of the sale of the land to the plaintiff.

(a) Approved in *Manahan vs. Sammon*, 3 Md. 471; *Elliott vs. Knott*, 14 Md. 184; *Wampler vs. Wolfinger*, 18 Md. 348; *Manton vs. Hoyt*, 43 Md. 264. See also *Barney vs. Patterson*, 6 H. & J. 157; *Dorsey vs. Thompson*, 37 Md. 45.

(b) Approved in *Elliott vs. Knott*, 14 Md. 184; *Johnson vs. Lemmon*, 37 Md. 345.

(c) Approved in *Tabler vs. Castle*, 23 Md. 102; *Manton vs. Hoyt*, 43 Md. 264. See *Raborg vs. Hammond*, 2 H. & G. 33, note (b).

Declarations to affect a sale made by a deputy sheriff, on the ground that they are a part of *res gestæ*, must appear to have been made at the time of the sale. (d)

Declarations of a deputy sheriff, at the time he made a sale of land under a *f. fa.* are inadmissible in an action of ejectment for the land, to contradict the return of the sheriff, and thus show that a tract returned as sold by one name, was in fact sold by another name. (e)

A verdict in ejectment which calls to run from one fixed object to another, with the meanders of a stream, not located upon the plots, is so entirely uncertain, whether it is within the lines of the tract claimed and defended or not, that no judgment could be entered upon it, nor writ of possession executed under it. It may therefore be set aside upon a motion in arrest, and a *venire de novo* awarded. (f)

APPEAL from Saint Mary's County Court. This was an action of ejectment, brought on the 28th January, 1834, by the appellee against Eleanor Ellis, for a tract of land called Penerine. At August Term, 1834, she appeared, pleaded not guilty, and took defence on warrant, on which issues were joined. Her death being suggested, the appellant, her tenant in possession, was summoned, and appeared to the action. At March Term, 1841, a jury was sworn, who returned a verdict, that the defendant in possession was guilty of the trespass and ejectment aforesaid, "of and in all that part of the tract or parcel of land in the declaration aforesaid mentioned, called Penerine, beginning at a blue stone marked A on the plot, and running thence to a locust marked B; thence with the meanders of the run to a poplar marked C; thence to D; thence to E; thence to the beginning boundary in manner and form as, &c."

* The appellant, the defendant below, moved in arrest of judgment, and assigned the following reasons: 444

1. Because the jury have returned a verdict for the plaintiff, and found the second line of said survey to run with the meanders of the run, when there is no run located on the plots as returned with the locations, in the cause.

2. Because said verdict is defective in not finding the location consistent with those made and returned in the cause, on run is located in the cause as shown by the plots and explanations in the cause, and hence the jury erred in bringing in a verdict designating what cannot be found in the plots or in the explanations.

3. Because they erred in bringing in such a verdict, and the same is inconsistent with the plots and explanations.

4. Because they had no right or power to return as a part of said location, a natural boundary no where designated in the plots.

(d) Cited in *Miller vs. State*, 8 Gill, 144.

(e) Cited in *Ramsburg vs. Campbell*, 55 Md. 281.

(f) Cited in *McKnew vs. Duvall*, Md. 512, as to entry of judgment upon a defective verdict.

5. Because the plots and explanations in the cause did not justify such a verdict, and the verdict is inconsistent with the locations in the cause.

Whereupon the said John Denn, lessee as aforesaid, by his attorney aforesaid, freely here in Court remits and releases to the said Richard H. Miles, tenant as aforesaid, all parts of the tract of land called Penerine, lying outside and beyond the boundaries B, C and D, as located on the plots. The motion was overruled.

1st Exception.—The plaintiff, to support the issue on his part, offered in evidence the record of an action of debt, brought by Francis Knott against William H. Llewellyn, on the 15th July, 1822, in which a judgment was rendered in favor of the plaintiff by St. Mary's County Court, on the 6th August, 1823, for 295.83½ cents current money, debt, and \$600 damages and cents. The damages to be released on payment of the interest on the debt from 27th November, 1821, till paid; payments, if any, to be allowed.

On the 29th September, 1823, William H. Llewellyn, John Llewellyn and Gustavus Brown, filed in the County Court a *super-
445 sedeas judgment to Francis Knott, enforceable on the 29th March, 1824, for the above debt and damages. Upon which supersedeas judgment an appeal was prayed to the Court of Appeals for the Western Shore. At June Term, 1825, the judgment upon the supersedeas was affirmed, and judgment rendered as in the County Court.

On the 14th September, 1825, William H. Llewellyn, John Llewellyn, Gustavus Brown, Richard Miles and Thomas Brown, confessed another supersedeas judgment, which recited a judgment for \$235.83½ cents, debt, to be released on payment of \$295.83½, debt, &c., corresponding in other respects with the judgment appealed from, adding however, the cost recovered in the Appellate Court. This judgment was due on the 14th March, 1826. These proceedings appeared in a record from the Court of Appeals.

The plaintiff then offered to read in evidence, the duly certified record of the *fieri facias*, issued on the 14th October, 1828, in which Francis Knott was plaintiff, and said W. H. L., J. L., G. B., R. H. M. and T. B. were defendants. This writ recited the judgment of 1823, as for \$295.83 debt, &c., damages \$600 and costs; the supersedeas of W. H. L., J. L. and G. B., of the 29th September, 1823, the appeal and affirmance of that judgment, the supersedeas of W. H. L., J. L., G. B., R. H. M. and T. B., of the 14th September, 1825. The writ further stated—and whereas, also on the 18th of April, 1826, the then sheriff of the county aforesaid, was commanded, that of the goods and chattels, lands and tenements of the said W. H. L., J. L., G. B., R. H. M. and T. B., being in his bailiwick, he should cause to be made the debt, damages, costs and charges, and that he should have those sums before the said Court of Appeals, to be held at the City of Annapolis, on the second Monday in June then

next, to render unto the said Francis Knott, the debt, damages, costs and charges aforesaid, on which said second Monday in June, in the year one thousand eight hundred and twenty-six, the then sheriff made return to the said Court of Appeals, that by virtue of the said writ, to him directed for that purpose, he had taken one tract
 * or parcel of land called Penryn, containing two hundred **446**
 acres more or less, of the lands and tenements of the said W. H. L., J. L., G. B., Richard H. Miles and T. B., in his bailiwick, being to satisfy unto the said Francis Knott, the debt, damages, costs and charges aforesaid, in the said writ mentioned, which said lands and tenements remained in his hands unsold, for want of buyers, so that the said debt, damages, costs and charges, he could not have as he was by the said writ commanded. And whereas on the twenty-second day of December, in the year eighteen hundred and twenty-six, the said then sheriff, to wit, William Williams, was commanded, that the said lands and tenements, so as aforesaid taken, he should expose to sale, and the money therefrom arising, he should have before the said Court of Appeals, to be held at the City of Annapolis, on the second Monday of June then next, to render unto the said Francis Knott, the debt, damages, costs and charges aforesaid, and all such costs as had accrued on the said writ of *fieri facias*, on which said second Monday in June, in the year one thousand eight hundred and twenty-seven, the said William Williams, then sheriff as aforesaid, made return to the said Court of Appeals, that the tract or parcel of land called Penryn, so as aforesaid taken, had been sold under an elder judgment, so that the said debt, damages, costs and charges he could not have, as by the said writ he was commanded. Therefore you are hereby commanded, that of the goods and chattels, lands and tenements of the said W. H. L., J. L., G. B., Richard H. Miles and T. B., being in your bailiwick, you cause to be made the debt, damages, costs and charges aforesaid, and have you those sums of money before the said Court of Appeals, to be held at the City of Annapolis, on the first Monday in December next, to render unto the said Francis Knott, the debt, damages, costs and charges aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness the Honorable JOHN BUCHANAN, Esq., Chief Judge of the Court of Appeals, this ninth day of June, in the year of our Lord one thousand eight hundred and twenty-eight. Issued the 14th day of October, 1828.
 TH. HARRIS, Clerk.

* Which said writ of *fieri facias* was thereon endorsed, to
 wit, &c. **447**

And now at this day, to wit, the said first Monday in December, being the said first day of the said month, in the year of our Lord one thousand eight hundred and twenty-eight, and the return day of the foregoing writ, comes into the Court of Appeals here, the said Francis Knott, by his attorney aforesaid, and the sheriff of Saint Mary's County aforesaid, to whom the said writ was in form afore-

said directed, to wit, Thomas W. Morgan, gentleman, makes return thereof to the Court here, thus endorsed, to wit: Laid as per schedule, and land sold to Francis Knott, 28th November, 1828, for \$550, and plaintiff satisfied as per receipt.

The schedule referred to in the said return is as follows, to wit: Saint Mary's County, to wit: We the subscribers, being duly summoned and sworn by the sheriff of the county aforesaid, by virtue of a writ of the State of Maryland, of *fiery facias*, at the suit of Francis Knott, to appraise the goods and chattels, lands and tenements of W. H. L., J. L., G. B., Richard H. Miles and T. B., do appraise the same in current money, as follows, viz: one tract or parcel of land called Penegreen, containing 160 acres more or less, at \$14 per acre—property given in by Richard H. Miles. Given under our hands and seals this 29th day of October, 1828, &c.

Test,—

THOMAS HARRIS, Clerk.

The defendant objected to reading the said *fi. fa.* and return, on the ground that it did not recite correctly the supersedeas judgment of Francis Knott, against W. H. L., J. L., G. B., Richard H. Miles and T. B., in this, that the supersedeas judgment is confessed for the sum of two hundred and thirty-five dollars and eighty-three and one-third cents, and the *fi. fa.* recites a judgment for two hundred and ninety-five dollars and eighty-three and one-third cents, and prayed the Court not to permit the same to be read in evidence, which prayer the Court, [C. DORSEY, A. J.,] refused to grant, but admitted the same to be read. The defendant excepted.

2d Exception.—In addition to the evidence in the first * bill 448 of exceptions, which is made a part of this, the plaintiff offered in evidence—

The *fi. fa.* of the 14th October, 1828, before referred to, with the schedule and return under it duly certified.

The supersedeas of the 14th September, 1825.

The *fi. fa.* of 18th April, 1826.

The *vendi.* of 22d December, 1826, and return.

The defendant objected to the reading of the said *fi. fa.* and return, on the ground that the judgment on which the *fi. fa.* issued, was a supersedeas judgment, taken before two justices of the peace for Saint Mary's County, on the 14th September, 1825, more than three years before the issuing of said *fi. fa.*, and that the judgment was dead, and required to be revived by *scire facias* before an execution could issue, notwithstanding it appeared to the Court, that a former *fi. fa.* issued on said judgment on the 18th April, 1826, which was returned to the Court of Appeals on the 2d Monday of June, 1826; that said judgment being dead in law, a *fi. fa.* issued on same was null and void, and property purchased under said *fi. fa.* vested no title in the purchaser. Which instruction and prayer the Court, [C. DORSEY, A. J.,] refused to give. The defendant excepted.

3d Exception.—In addition to the evidence in the first and second bill of exceptions, which is made a part of this bill of exceptions, the plaintiff, to prove in what character Richard H. Miles, the present defendant, appeared in Court to defend the suit, of Knott, after proving that Eleanor A. Ellis occupied the tract of land called Pennerine, now in controversy, for the years 1836 and 1837, offered to read in evidence to the jury an account and receipt of Richard H. Miles to Mrs. Eleanor A. Ellis, administratrix, for rents for the years 1836 and 1837.

Eleanor A. Ellis,
1837, January 1.

To R. H. Miles, Dr.

To rent for 1836,	(say).....	\$150 00
To interest from the 1st of Jan., 1837, till paid....		11 25
To rent for 1837,	(say).....	150 00
To interest from Jan. 1st, 1838, till paid.....		2 25

\$313 50

* Saint Mary's County, to wit: On this 13th day of March, 1838, being since the death of Eleanor A. Ellis, before me, the **449** subscriber, one of the justices of the peace in and for said county, appeared Richard H. Miles, and made oath on the Holy Evangelical of Almighty God, that the above account as stated, is just and true, and that he hath not received any part of the money stated to be due, or any security or satisfaction for the same, to the best of his knowledge and belief.

Sworn before,

T. H. MILES.

Received, April 1st, 1838, of William L. Shurburn, administrator of Eleanor A. Ellis, deceased, the sum of three hundred and thirteen dollars and fifty cents, in full for the within amount. **\$313.50.**

R. H. MILES.

March 14th, 1838.—By the Orphans' Court examined and passed.

G. COMBS, Register of Wills.

In testimony that the foregoing is a true copy taken from the original, filed and recorded in the register of wills office of

[Seal.] Saint Mary's County, I have hereunto set my hand, and affixed my official seal, this 4th day of May, *Anno Domini* 1841.

G. COMBS, Reg. of Wills for St. Mary's Co.

The defendant objected to the same as inadmissible for any such purpose, but the Court admitted the same to go to the jury. The defendant excepted.

4th Exception.—After the testimony incorporated in the first, second and third bills of exceptions, which is made a part of this the defendant prayed the Court to instruct the jury that the plaintiff was not entitled to recover, unless they first shewed a title out of the State, but the Court refused the instruction. The defendants excepted.

5th Exception.—In addition to the evidence in the foregoing bills of exceptions, which are made a part of this, the plaintiff to support the issues on their part joined, offered to give in evidence to the jury by John M. Goldsmith, that he was present at the sale of the real estate made by George H. Morgan, deputy sheriff of Thomas W. Morgan, in the *feri facias* of *Francis Knott vs. William H. Llewellyn*, and others.

450 * The plaintiff here again set forth the *fi. fa.* of 14th October, 1828, with the levy, schedule, and return of sale—and then proved that George H. Morgan, the deputy sheriff, who made the sale, is dead, and that he heard George H. Morgan, the deputy sheriff, state that he sold the land called Penerine, and that Francis Knott, the plaintiff in said *fi. fa.*, and the lessor of the plaintiff in this suit, was the purchaser of said land called Penerine. The defendant then offered to read in evidence to the jury the schedule of said real estate as taken by the sheriff and appraised by sworn appraisers, and returned by the sheriff as a tract of land called Penegreen.

And now at this day, to wit, the said first Monday in December, being the first day of the said month, in the year of our Lord one thousand eight hundred and twenty-eight, and the return day of the foregoing writ, comes into the Court of Appeals here, the said Francis Knott, by his attorney aforesaid, and the sheriff of Saint Mary's County aforesaid, to whom the said writ was in form aforesaid directed, to wit: Thomas W. Morgan, gentleman, makes return thereof to the Court here, thus endorsed to wit: Laid as per schedule and land sold to Francis Knott 28th November, 1828, for \$550, and plaintiff satisfied as per receipt.

The schedule referred to in the said return is as follows, to wit:

Saint Mary's County, to wit: We, the subscribers, being duly summoned and sworn by the sheriff of the county aforesaid, by virtue of a writ of the State of Maryland of *feri facias*, at the suit of Francis Knott, to appraise the goods and chattels, lands and tenements of William H. Llewellyn, John Llewellyn, Gustavus Brown, Richard H. Miles and Thomas Brown, do appraise the same in current money, as follows, viz:—one tract or parcel of land, Penegreen, containing 160 acres, more or less, at \$14 per acre, property given in by Richard H. Miles.

Given under our hands and seals, this 29th day of October, 1828.

THOMAS W. MORGAN, Sheriff.

N. B. C. WITEE, [Seal.]

his
JOHN ~~X~~ ELLIS, [Seal.]
mark.

451 * And then prayed the Court to reject the testimony of John M. Goldsmith, as hearsay, and also inadmissible to vary or contradict the sworn and written return of the sheriff; but the

Court overruled the objection, and permitted the testimony to go to the jury. The defendant excepted.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

P. W. Crain and R. Johnson, for the appellants. Causin, for the appellees.

ARCHER, J. delivered the opinion of this Court. The plaintiff to support the issue joined on his part, offered in evidence to the jury a record of the Court of Appeals, by which it appeared, that a judgment had been obtained in St. Mary's County Court, by Francis Knott against William H. Llewellyn, for the sum of \$295.83½ cents and costs, on the first Monday of August, 1823; and was, on the 29th day of September, 1823, superseded, and in the confession of judgment by way of supersedeas, the amount of the judgment is stated to be \$295.83½ cents. From this supersedeas judgment, an appeal was taken to the Court of Appeals, and on the 16th July, 1825, the judgment was affirmed. On the 14th September, 1825, the judgment thus affirmed, was superseded by the defendants, together with Richard H. Miles, and in the said supersedeas judgment, the parties confess judgment for the sum of \$235.83½ cents, debt, with interest and costs, which were recovered by Francis Knott in the Court of Appeals, on the 16th July, 1825, and the supersedeas proceeds, as follows, "the said sum of \$295.83½ cents, current money, debt, to be released on the payment of \$295.83½ cents, with interest, &c., and costs, &c., to be levied of your bodies, goods, &c., in case the said defendants in the said judgment, shall not pay and satisfy to Francis Knott, the said sum of \$295.83½ cents, current money, damages and costs; to be released on payment of 295.83½, with interest, and costs, so as aforesaid recovered against them, with the additional costs thereon, on the 14th * day of March next."

The plaintiff further offered in evidence a *fi. fa.* issued on the said supersedeas judgment, on the 14th day of October, 1828; by this it appears that the supersedeas judgment is described, as corresponding with the judgment in the Court of Appeals. The defendant objected to the reading of the *fi. fa.* in evidence, on the ground, that it did not recite correctly the judgment of Francis Knott against Richard H. Miles and others, in this; that the supersedeas judgment is confessed for the sum of \$235.83½ cents, and *fi. fa.* recites a judgment for \$295.83½ cents, but that the Court admitted the *fi. fa.* to be read in evidence, and from this opinion of the Court an exception has been taken. 452

If the defendant were right in supposing that there was a misrecital of the judgment in the *fi. fa.*, we think, that for such cause only, the *fi. fa.* would not be inadmissible in evidence. It must be remembered, that no exception is taken to the judgment, but to the

issuing of a *fi. fa.* not corresponding with the judgment. The failure to recite the judgment accurately in the *fi. fa.* did not render the process void. It was erroneous process. But such an error would not affect the title of a purchaser, acquired by a sale under it. 4 *Wend.* 464; 12 *Wend.* 96, 97. For this reason, we think the evidence offered in the first bill of exceptions, was admissible.

The 2nd exception was intended to raise the question whether a purchaser under a *fi. fa.*, issued more than three years after the rendition of the judgment, acquired a title in virtue of such sale.

The Act of 1778, chap. 21, gives plaintiffs a year after a stay entered on the docket, to issue execution. The Act of 1823, chap. 194, gives three years from the date of the judgment, within which to issue execution. The Act of 1823, chap. 194, is too explicit to admit of a doubt. The Legislature did not mean to give three years from the expiration of the stay, but three years from the date of the judgment. They use the words "stay," in the law of 1778, and the words "judgment," in the law of 1823, from the date of which executions are to issue. By the use of such different terms, it is fair to

453 infer *they meant different things; accordingly, if there be no stay on the judgment, or a stay not exceeding two years, execution must be taken out within three years from the date of the judgment—if the stay be for three years, or a longer period than three years, then execution may be taken out within a year from the expiration of such stay, according to the Act of 1778, chap. 21.

The judgment of supersedeas dates from the day of its confession, and not from the day of its being filed, at least, so far as this question is concerned. How far it operates as a lien from the date of its confession, is not a question involved in this case; but the only question is, what is the date to which you are to look in issuing an execution. And this question is answered by the Act of Assembly of 1823, which declares it may be issued at any time within three years from the date of the judgment.

In this case, the three years from the date of the supersedeas judgment expired on the 14th day of September, 1825, and the *fi. fa.* on which the land was sold, issued on the 14th of October, 1828, more than three years from the date of the judgment. No execution, therefore, could rightfully issue on the judgment, without a *sci. fa.* to revive it.

Could a title pass to a purchaser under an execution thus issued? This depends on the solution of the question, whether the execution is voidable or void. If the latter, clearly no title would pass. But if the former, the purchaser acquires a title. That the process is only voidable, is abundantly established by many authorities, which will be found referred to in the opinion of Chancellor Kent, 16 *John.* 575, 576, and he there says that the question of irregularity can never be discussed collaterally in another suit; and to the same effect will be found 8 *John. Rep.* 361. We, therefore, think the Court below

committed no error in the opinion by them expressed in the second bill of exceptions.

We are of the opinion, that the evidence offered in the third bill of exceptions was inadmissible. The register of wills was not authorized by law to furnish such a copy of vouchers, * passed by an executor or administrator, as will be received in evidence **454** to establish the facts set out on the face of such vouchers. The law does not require these vouchers to be recorded. They belong to the executor or administrator, and are not placed in the office for record.

We think the Court were right in the opinion expressed by them in the fourth bill of exceptions. It is admitted, that the defendant in this suit is the same person who was debtor in the judgment obtained by Knott; he is here taking defence for this land, and resisting the right of the plaintiff to recover. In the record he is called the tenant of Mr. Ellis. Whatever interest he has in the land, if the plaintiff establishes the fact of his being a purchaser under a judgment and *fi. fa.* against the defendant, such land should be recovered by the plaintiff, whether he is enabled to establish his right by a regular deduction of his title from the State or not, is immaterial. All that is required, is the production on the part of the plaintiff of the judgment against the defendant, the *fi. fa.*, and the sale of the land to the plaintiff. *Fenwick vs. Floyd*, 1 H. & G. 174.

The plaintiff, in the fifth bill of exceptions, offered to prove by a witness, that he was present at the sale of the real estate made by George H. Morgan, deputy sheriff, on the *fi. fa.* of *Francis Knott vs. William H. Llewellyn* and others; that the deputy sheriff who made the sale, is dead, and that he heard him state, that he sold the land called Penerine, and that Francis Knott, the plaintiff in the *fi. fa.*, and lessor of the plaintiff, was the purchaser. The question on this exception arises on the admissibility of the evidence above offered.

This evidence is objected to, both as hearsay evidence, and as contradicting the sheriff's return. It is insisted, that it ought to be received as part of the *res gestæ*. If this were a case in which evidence of the *res gestæ* was admissible, still this evidence could not be received, because the statement of the deputy sheriff is not proved to have been made at the time of the sale. It may have been made at any time between the sale and the death of the deputy sheriff.

* But if the declarations offered in evidence had been made at the time of the sale, that the evidence contradicts the sheriff's return, is an insuperable objection to its admissibility. The sheriff returns a sale of a tract of land called Pennygreen, the evidence is to show that he sold a tract called Penerine. There is no evidence that they are the same tract; on the contrary, the presumption would be, the names being different, that the tracts were different. The levy was on Pennygreen, and no other tract could be legally sold but Pennygreen, yet the evidence would make the sheriff, **455**

although he returns a levy and sale of one tract, declare he had sold another tract not levied upon. We are, therefore, of opinion, that the evidence offered in this exception, was inadmissible, and should have been rejected by the Court below.

After verdict, a motion was made in arrest of judgment.

The jury found for the plaintiff—for all that part of a tract of land called Penerine; beginning at a blue stone, marked A on the plot, and running thence to a locust, marked B; thence with the meanders of the run to a poplar, marked C; thence to D; thence to E; thence to the beginning. The run called for in the verdict is not located on the plots, so that the line from B to C is entirely uncertain whether it is within or without the location of the land called Penerine, as located by the plaintiff, is unknown, and is incapable of ascertainment. On this account the verdict is so imperfect, that no judgment could be entered thereon, and no writ of possession could be executed.

The next question which arises, is on the motion in arrest of judgment. We have seen that the verdict is imperfect and uncertain. The matter in issue is not so ascertained, that the Court could render any judgment capable of being executed. The motion in arrest in many cases, as where the pleadings are defective, may admit the correctness of the verdict, but this is not universally the case. Judgments are sometimes arrested for faults in the verdict. *Gould on Plead.* 522. The same author refers to many instances of defective verdicts, where the remedy is by motion in arrest. In *Dorsey's Lectures*, 73, it is said, that a judgment in ejectment will be
456 *arrested for uncertainty. Where a judgment is arrested for such defects in the verdict, a *venire de novo* must be awarded. *Gould* 526. The Court below were, therefore, in error in not arresting the judgment in this case, which we have here is uncertain and imperfect.

As it is uncertain whether the finding is within or without the pretensions of the plaintiff, it is a case, certainly not proper for a *remittitur*.

We express no opinion on the question, whether the supersedeas judgment is a binding and operative judgment, no question on this subject having been raised in the bills of exceptions.

Judgment reversed, and procedendo awarded.

STATE, use of SUSANNA HICKLEY, Administratrix of CATHARINE HICKLEY *vs.* D. STEWART and J. I. GROSS, Executors of JOHN GROSS.—December, 1842.

An appeal will lie from the judgment of the County Court setting aside an award. (a)

Where a cause had been referred to arbitrators, with power to decide all matters in controversy between the plaintiff and defendant, and the arbitrators had returned an award, subject to no exception upon the face of it, upon a motion to set the award aside, the Court will not receive parol proof to control or alter the terms of the submission, nor the depositions of the arbitrators to show the character of the items of which the award was composed, or that they had decided upon a matter before the reference finally adjudicated, and so not within the submission.

Where the County Court set aside an award, and their decision upon appeal is reversed, there being no objection to the award on its face, nor any thing in the record to impeach it, this Court will enter judgment in conformity to it.

APPEAL from Baltimore County Court. This was an action of debt, commenced on the 31st December, 1834, by the appellant against John Gross, deceased. The plaintiff declared on the bond of John Gross of the 27th April, 1837, conditioned for the due performance by him * of the office of administrator of Sebastian Hickley, deceased. The defendant pleaded general perform- **457**
ance. The plaintiff assigned breaches, when, without rejoinder, the cause was referred to William G. Read and John J. Lloyd, with power to choose a third in case of difference, and to decide all matters in controversy between S. H., administratrix of Catharine, and John Gross, administrator of Sebastian Hickley, under a rule of Court.

The arbitrators returned the following award :

"State of Maryland, use Susanna Hickley, administratrix, with the will annexed of *Catharine Hickley vs. John Gross*. We, William G. Read and John J. Lloyd, referees by Baltimore County Court, in the above named case, having given due notice to the parties of the time and place of hearing their respective allegations and proofs, and having heard and duly considered their said allegations and proofs, do award and determine, that the said defendant, John Gross, is indebted to the said plaintiff, in manner and form as the said plaintiff has declared against him; and we do further award and determine, that judgment for the plaintiff be entered in the said case, for the debt and damages in the declaration and costs, to be released on the payment of the sum of three thousand two hundred

(a) Affirmed in *Garitee vs. Carter*, 16 Md. 811. Cited in *Green vs. Hamilton*, 16 Md. 828.

and seventy-five dollars and twenty-five cents, with interest from the date hereof, and costs, till paid. Given under our hands and seals this 20th day of July, 1838.

WILLIAM GEO. READ, [Seal.]

JOHN J. LLOYD, [Seal.]

Which said award is thus endorsed, to wit: "Service of copy admitted. D. S. for J. Gross."

At September Term, 1838, the defendant objected to a confirmation of the award, and prayed the Court to set aside the same, for the following reasons, to wit:

1st. Because the said award decides matters not in controversy between the parties in this, to wit: that on a matter finally decided by the Court of Appeals of this State, on an appeal between the present parties, the said Court, before the date of the reference under which the said award was rendered, * finally decided **458** that the said defendant was wholly free and discharged from said matter of claim, and in no wise liable to said plaintiff, for or on account of the same, as will appear by a copy of the opinion of the Court of Appeals in said case, herewith filed, and prayed to be considered as making a part of this objection.

2d. Because the said arbitrators, in making the said award, went contrary to law, in this; that as the said matter, as before stated, was so finally decided by said Court of Appeals, the same was not, and could not be considered as embraced by the terms of said reference.

3d. Because said award is in other particulars contrary to law.

At May Term, 1840, the death of John Gross was suggested, and at January Term, 1841, the present appellees were brought in by attachment, and appeared to the action.

At the hearing of the motion made to set aside the award, the defendants offered in evidence the record of the Court of Appeals, in the case of John Gross, appellant, and Susanna Hickley, administratrix *de bonis non* of Catharine Hickley, appellee, which record in the Court of Appeals, it is agreed, may be read as evidence in the trial of this case in the Court of Appeals, as by agreement filed. "Hickley, administratrix *de bonis non* of Hickley vs. Stewart and others, executors of J. Gross. In Baltimore County Court, September Term, 1841. It is agreed in this case, that the record of the case in the Court of Appeals, of Gross vs. Hickley, administrator of Hickley, on appeal from the Orphans' Court of Baltimore County, be read in the Court of Appeals, upon the argument of the appeal in this case, to have the same effect and operation as if now inserted in the record, and transmitted as a part of the transcript to the Court of Appeals."

The defendant further offered in evidence the affidavit of David Stewart, duly taken on the 25th October, 1839: that at the time of the reference in this case, he the said David Stewart did not consider that the credit of \$3,006.75, given the said John Gross, as

administrator of Sebastian Hickley, in his * account as administrator, settled in the Orphans' Court of Baltimore County on the sixth day of July, 1829, was a matter in dispute in this cause, as the same had been passed upon and allowed by the Court of Appeals of Maryland, at its December Term, 1835, as a proper credit in the accounts of the said administrator; and the said defendant further made oath, that he intended the said reference to embrace other items in controversy, altogether exclusive of the credit above mentioned, and that upon this view of the subject, he informed his client of the reference, and particularly, that the aforesaid item was not again to be contested before the referees. **459**

The defendant further offered in evidence the statement of the arbitrators, John J. Lloyd and William George Read :

We state, that when the said cause was before us as referees, the plaintiff claimed for an item of \$3,006.70, for which said John Gross, in his administration account, as administrator of Sebastian Hickley, deceased, had obtained credit in July, 1829, without having paid it. On the other hand the defendant's counsel contended, that that item was not open for our examination, because the opinion and decree of the Court of Appeals of Maryland, in the case of *Gross, administrator c. t. a. of Sebastian Hickley vs. Susanna Hickley, administratrix, &c.*, on appeal from the Orphans' Court, was conclusive as to it, and that it was not submitted to us in the above cause. The evidence in relation to said item was taken, subject to said objection and exception of the defendant's counsel. On consideration, it was decided by us, as referees, that although the said opinion and decree of the Court of Appeals were entitled to our highest respect and consideration, yet as that decree remanded the cause for further proof in the Orphans' Court, and was in a different suit, and as evidence was before us on this point, which was not in the record before the Court of Appeals, by which new evidence it was perfectly clear to us, that said John Gross had not in fact paid the sum of \$3,006.70, at the time he so obtained credit for it in his administration account aforesaid, but only paid at that time \$500, and afterwards, on the 11th July, 1830, he paid on account of it the further sum * of \$500, and afterwards, on the 2nd February, 1833, he paid the **460** further sum (on said account,) of \$1,066.89, and no more; and it further being proved to us, that in the settlement made between said Gross, as administrator of Sebastian Hickley, with William Hickley, on 20th January, 1833, (paper A,) that said William Hickley acted on the belief that said John Gross had only obtained credit on his administration account of Sebastian Hickley's estate for what he had actually paid, and that in said settlement, the fact of this item of \$3,006.70, or part of it, was still outstanding against said estate, was not taken into consideration, we the said referees, in making up our said award, charged said John Gross with the debt of \$3,006.70, and also \$100, the reason for which we do not now

recollect, though we were satisfied at the time, that said additional charge of \$100 was correct, and suppose now it was on account of the difference of interest from July, 1829, when Gross got credit for it,) and in said award we credited said Gross with the payments which he had in fact made on accounts of said \$3,006.70, to wit, with \$500 paid in July, 1829; \$500 paid on 11th July, 1830, and \$1,066.89, paid on 2nd February, 1833, and also charged and credited various other matters, which we understand, it is not material here to state. It was also in proof before us, that a certain receipt, (or receipts, as Mr. Read thinks,) which, in the aforesaid, opinion of the Court of Appeals, was treated as in the possession of and belonging to said John Gross, did not belong to him, but was the property of and in possession of John I. Gross, as the administrator of the above named William Hickley.

7th October, 1841.

JOHN J. LLOYD,

WILLIAM GEORGE READ.

And proved the truth thereof by the oral examination of said Lloyd.

The plaintiff then offered in evidence by John J. Lloyd, one of the arbitrators, that it was not his habit to state the reasons for his awards on the face of the awards, unless the parties requested it before it was known by them how it was to be decided, and that

461 when he did not state the reasons on the * face of the award, it was not his habit to disclose the reasons after the award was rendered, not because he was unwilling that they should be known, but because he did not think it just to give the party against whom it was made such an advantage, after having taken the chance of an award in his favor. That in the present case, the counsel for the defendants had called on witness and Mr. Read to give them a statement of the grounds on which the award was made, and they had declined assigning therefor the reasons above stated, but both witness and Mr. Read stated to them that they were willing to give such a statement if the counsel on both sides consented to it, or if the Court should direct it. After this the written statement was made in order to prevent delay, in case the said Lloyd and Read should be absent, and it was handed to the counsel, subject to the same objections as if the arbitrators had been on the witness' stand. On its being arranged between the Court and counsel that we should go out and make the statement subject to exceptions, we read the written statement as his testimony, and proved that when the said reference took place, the said William George Read and John J. Lloyd were attorneys of this Court, have been, and still are.

The plaintiff further read without objection the affidavits of George Gordon Belt and John I. Gross, heretofore filed by the plaintiff in this cause:

"The State of Maryland, use of Susanna Hickley, administratrix, with the will annexed of Catharine Hickley vs. David Stewart and John I. Gross, executors of John Gross. In Baltimore County Court, Sep-

tember Term, 1841. Be it remembered, that on this eighteenth day of September, in the year eighteen hundred and forty-one, George Gordon Belt, in open Court, made oath that he instituted the foregoing suit as counsel and attorney for the plaintiff, and negotiated and agreed upon the reference thereof with David Stewart, Esq., now one of the defendants, but then the counsel of John Gross, the deceased; that at the time of the reference, deponent believed that all matters of account against the said defendant, John Gross, as administrator of Sebastian Hickley, and all matters * or claims whatever against him as such administrator, embraced by the 462 the pleadings in the cause, and including the item of \$3,006.75, mentioned in the deposition of David Stewart, Esq., heretofore filed in this cause, were referred to and open to the examination of the arbitrators selected by the parties; that he so informed his client, through her father and agent, Lewis Gross, whilst the parties were negotiating the reference, and before it was yet made; that it was never intimated to him by David Stewart, Esq., or any other person, that said item or claim of \$3,006.75, was not a matter or claim in dispute in this cause until the trial thereof before the arbitrators, nor then otherwise than by the allegation and argument of counsel; that the decision of the Court of Appeals in the said deposition of David Stewart, Esq., referred to, was final and conclusive. Deponent further says, that if it had been intimated to him that said reference was not general, but was exclusive of said item of \$3,006.75, said reference never would have been assented to. Deponent further says, that much testimony in addition to that before the Court of Appeals, and in explanation of parts of it, was adduced before the arbitrators, applicable to the said item of \$3,006.75 by the plaintiff, and as he believes by the defendant, and that said item was fully tried and argued upon the law and upon the merits by both parties, before the arbitrators, but deponent does not know the items of charge embraced in the award."

The deposition of John I. Gross states, "that he was a witness at the trial of the above cause before the arbitrators, and attended several meetings; that upon one occasion, when deponent was present, John Gross, the defendant, Lewis Gross, the father of Mrs. Hickley, and acting for her, and Andrew Shorb and others, were also present; that in the course of the proceedings an altercation sprang up between John Gross and Lewis Gross, and that afterwards, in frequent conversations with this deponent, and in reference to said altercation, the said John Gross told this deponent that all matters in dispute were left to the arbitrators to be settled. Deponent further says, that on the occasion above mentioned, the matter in * relation to Shorb's debt was examined into before 463 the arbitrators, and was one of the subjects before them."

To all which offers of evidence by the defendant, when made the plaintiffs objected as soon as the offer was made, and then

objected to the admissibility of the affidavit of David Stewart, upon the following grounds:

1st. That said affidavit was inadmissible in evidence for the purpose of controlling or altering the terms or construction of the agreement of reference, and rule of reference, under which the above cause was referred to arbitrators.

2nd. That said affidavit was inadmissible in evidence for the purpose of proving that any matter of difference embraced by the said agreement and rule of reference, under which the said cause was referred as aforesaid, was not submitted to said arbitrators by said agreement and rule of reference.

The plaintiff also objected to the admissibility of the affidavit of the arbitrators, upon the following grounds:

1st. That said statement of the arbitrators, verified by the affidavit of said Lloyd, was inadmissible generally as evidence on the hearing of this motion.

2nd. That said statement, verified by the affidavit of said Lloyd, was inadmissible as evidence for the purpose of showing in what manner said arbitrators had made up their award, and what items of claim were embraced in it.

3rd. That said statement, verified by the affidavit of said Lloyd, was inadmissible in evidence for the purpose of showing the grounds of the decision of said arbitrators as to any claim embraced by their said award.

4th. That said statement, verified by the affidavit of said Lloyd, was inadmissible in evidence for the purpose of proving that the said arbitrators committed any error in law in making their said award, or that there was any error in law committed by said arbitrators in said award in allowing any claim embraced by said award.

But the Court (ARCHER, C. J., and PURVIANCE, A. J.,) were of opinion that the deposition of David Stewart was admissible, and **464** that so much of the deposition of John J. * Lloyd, Esq., as stated the subject-matter of the award filed in this case and the character of the items of which it was composed, was admissible; and also that part of said deposition of John J. Lloyd which show the claim of the plaintiff and the denial of the defendant, that said claim was within the submission, is also admissible for the purpose of showing that the arbitrators had in their award decided on a matter already, before the reference finally adjudicated, and not within the submission; to which opinions of the Court and to each and every of them, and to their reception of the affidavit of D. Stewart and J. J. Lloyd for the purpose aforesaid, the counsel of plaintiff excepted.

The paper marked A, referred to in the foregoing exceptions, is as follows, to wit:

DR. *William Hickley, in account current with John Gross, Baltimore.*

		<i>Amount.</i>	<i>Interest.</i>
1829, Oct. 20—	To cash paid att'y Stewart.....	\$200 00	
" "	" cash lent you.....	60 00	
" 23 "	" cash lent you.....	100 00	
	Interest 3 years and 3 months on \$360		70 20
Nov. 14—	To cash paid officers' fees, &c.....	15 84	
" 5 "	" cash lent you.....	100 00	
	Interest 3 years and 2 months on \$115.....		21 85
1830, Jan. 27—	To cash paid insurance.....	10 40	
	" cash paid do. High and Low Streets.	100 00	
	" cash paid	2 50	
	Interest 3 years on \$100.....		20 16
July, 11—	To cash lent you.....	30 00	
	" cash paid Shorb's note.....	500 00	
	Interest 2 years 6 months on \$530		79 50
Aug. 30—	To cash paid.....	1 50	
* Sept. 21—	To 1 panel for tombstone.....	100 00	
	" 4 tomb stones at \$20.....	80 00	465
	Interest 2 years and 4 months on \$180.....		25 34
Dec. 2—	To cash lent you.....	15 00	
	" cash paid ground rent.....	9 37	
	Interest 2 years and 1 month on \$24.....		3 07
1831, Nov.	To cash paid White and Chase for rent.....	87 50	
	Interest 1 year and 2 months on \$87.....		6 09
1832, Augt. 31—	To cash lent.....	200 00	
	Interest 4½ months.....		4 50
	To cash lent.....	150 00	
	Interest 1½ months.....		1 12
		<hr/>	
		\$1,762 11	231 83
	To amount of interest to date.....	231 83	
		<hr/>	
		\$1,993 94	
	Amount of interest on \$2,607 for 3 years and 3 months, paid to Shorb,	247 66	
		<hr/>	
		\$2,241 60	

OR.

1829, Oct 20—By cash, Cathedral money.....	\$3,447 00
Interest for 3 years and 3 mos. at 6	
per cent.....	672 17 673 17
	<hr/>
	\$4,119 17
	2,241 60
	<hr/>
Due W. Hickley.....	\$1,877 57
To error in calculation of interest on \$2,607.....	260 71
	<hr/>
E. E. Due W. H.....	\$1,616 86

466 * And thereupon, after the evidence had been offered, which is stated or referred to in the foregoing bill of exceptions, and upon the hearing and consideration by the Court here, of the said evidence, and of the exceptions taken on behalf of the defendants to the award filed in this cause, it is considered by the Court here, that the award aforesaid, be and the same is hereby set aside, and held entirely as void, and of no force or effect. The plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN and SPENCE, JJ.

McMahon, for the appellant.—The first exception taken in this cause relates to the admissibility of the depositions of David Stewart and John J. Lloyd. And the appellant will contend, that the Court below erred in receiving said testimony, and especially in receiving it for the purposes stated in said objections, or any of them.

The 2nd exception relates to the decision of the Court below, setting aside the award, which decision, the appellants will maintain, was erroneous, and in support of their allegation of error, will contend for the following propositions:

1st. That the reference in this case gave the referees the power of deciding upon all claims or demands involved in, or within the scope of the action referred, and all matters in controversy between the parties, and especially upon the propriety and justice of the allowance claimed and given in the accounts of said John Gross, as administrator of Sebastian Hickley, (as settled in the Orphans' Court,) for the alleged payment of the debt due to Shorb by said Hickley.

2nd. That the extent and effect of said reference could not be in any degree qualified or restricted, nor the right of the referees to decide upon the justice of the said allowance for Shorb's debt, as a matter of fact in controversy between the parties, in any respect affected by the mere undivulged impressions or belief of Gross, or his counsel, as to the extent of the reference, even if the evidence of the same were admissible.

* 3rd. The decree of this Court was not final and conclusive, so as forever to debar the appellant in this case from contro- **467**
 verting the right of said Gross to the said allowance made him for Shorb's debt, in his accounts, as settled in the Orphans' Court; and that either, upon the trial of the action on the bond in Baltimore County Court, or of the matters referred before the referees, it was competent to said appellant, notwithstanding said decree, to controvert Gross' right to said allowance.

4th. That whether said decree was or was not final, the said appellant might, at the trial of the action on said bond, have objected, that the same was not final, and was entitled to have that question tried and decided; that the question, as to the effect of said decree, was open to contest, and was in fact, a matter in dispute; and that the said action, and all matters in controversy having been referred, the decision of the referees upon the effect and conclusiveness of said decree, was final and conclusive, (and above all, in a case where the referees were attorneys or legal arbitrators,) and that the Court below had no right to review or correct their decision, on that or any other question that arose in the trial before the referees, even if erroneous, there being nothing on the face of the award disclosing any such error.

5th. That even if the arbitrators exceeded their authority in disallowing the allowance for Shorb's debt, the Court below erred in setting aside the whole award.

J. Johnson and *G. M. Gill*, for the appellees, moved to dismiss the appeal, and maintain the converse of the appellant's propositions.

Upon the motion to dismiss the appeal, they insisted—1st. That at the time when the appeal was prayed and taken, there was no final judgment of Baltimore County Court, and that the judgment appealed from was interlocutory, and not final.

2nd. That it was in the power of Baltimore County Court to re-instate the said cause, and direct the same to be tried as * other **468**
 causes are tried in Baltimore County Court, and it does not
 appear whether the same was so re-instated or not; the appeal having been taken from the judgment of that Court, setting aside the award.

BY THE COURT—

Let the judgment of the County Court be reversed, and judgment be entered upon the award for the appellants.

Judgment reversed.

MASON and LEEF vs. THE FRANKLIN FIRE INSURANCE COMPANY.—December, 1842.

A policy of insurance against fire, upon a vessel, building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties in the present contract.

In a valued policy against fire, "on a new barque now being built," it was the design of the parties to cover the vessel in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be her progress towards completion, when the fire occurred.

The policy, in the absence of proof of usage, did not attach upon articles made for the vessel, delivered in the ship yard where she was constructing, in a condition, and intended to be fitted and attached to her, if she had been, or as soon as she might be ready to receive them. (a)

APPEAL from Baltimore County Court. This was an action of covenant, brought by the appellants against the appellees, on the 27th April, 1841.

The plaintiffs declared upon the policy mentioned in the bill of exceptions, and the defendant pleaded they had not broken their covenant, with leave to both parties to give any matter in evidence which might be given under any other plea. Errors of pleading were waived.

At the trial of the cause, the plaintiffs, in order to support the issue on their part, gave in evidence the policy of insurance declared on, of the Franklin Fire Insurance Company of Philadelphia.

469 * "This policy of insurance witnesseth, that the Franklin Fire Insurance Company of Philadelphia have received of William Mason & Co., six dollars forty cents, premium, for insuring (according to the tenor of their printed proposals and conditions, hereunto annexed,) upon the property herein described, viz: On a new barque now being built at Samuel Butler's ship yard in Baltimore, Maryland. Now, know all men by these presents, that in consideration thereof, the capital stock, estate and securities of the Franklin Fire Insurance Company of Philadelphia, shall be subject and liable to make good and satisfy unto the insured, their heirs, executors, administrators or assigns, all such damage or loss which shall or may happen by fire, to the property above mentioned, from the date hereof, to the full end and term of two months, not exceeding the sum of \$4,000, say four thousand dollars, unless the said company shall, &c."

(a) Cited in *Eichelberger vs. Müller*, 20 Md. 385.

It is agreed that this policy shall expire at twelve o'clock at noon, on the 10th Dec., 1840. In witness whereof, &c.

The plaintiffs further gave in evidence, that the new barque therein referred to, was launched on or about the 30th day of November, 1840, and called the Orb, having on board her lower masts and rigging belonging thereto; that on the evening of the day following, the ship yard of Samuel Butler was set on fire, and all combustible articles therein were entirely burned up; and further, that previous to the aforesaid fire, and subsequent to the 10th day of October, 1840, certain spars, blocks, cordage and other articles necessary and proper for the building, fitting and equipping the aforesaid barque were prepared, finished and delivered, at and in the said ship yard, ready for setting up, but which had never been put upon said barque, and being after such delivery at the sole risk of the owners of the said barque; that the said spars were at the time of the fire aforesaid, lying within from four to ten feet of the said barque, and the blocks, ropes, rigging and other articles, were lying partly in a shop, and principally in a loft over the shop, within from forty to fifty feet of the said barque, but all within the enclosure of said Butler's ship yard; and that it * is usual for riggers and ship builders to store the light spars intended to be put on new vessels under 470 sheds, or in the lofts of buildings in ship yards where there were such buildings.

The plaintiffs further gave in evidence by a witness who examined the ruins the day following the fire, and had worked on the materials hereinafter referred to, that the fire had burnt the following articles:

A list of blocks, rigging and spars belonging to the new barque, Orb, burned at Butler's ship yard, December 1st, namely, &c., &c.

And that neither the hull of the said barque, nor any of the materials on board of her were burned or injured by the fire.

The plaintiffs further gave in evidence sundry accounts of articles furnished to supply such as were burnt as aforesaid, and the particulars of labor required thereon, according to a statement thereof summed up in the following paper, &c., valued at \$834.40.

The plaintiffs further offered in evidence, by Charles W. Karthaus, a competent witness, that in the month of February, 1836, a ship of his called the Jefferson, arrived at New York, where her sails were sent to a sail loft to be repaired, and four or five new sails in place of those worn out, were ordered to be made for said ship, but were not sent on board; that said ship was insured upon time; that a fire occurred in said sail loft in New York, by which said sails were destroyed; that the witness inquired the usage as between the insurers and insured in the port of New York, in regard to the loss in such cases, and ascertained that the usage there was, that the insurers were liable; and upon that fact being made known to the Neptune Insurance Company of Baltimore, they paid the said loss. The plain-

tiffs further proved by said witness, that he had been informed by others, that the same usage in regard to vessels whose sails are sent on shore for repair, from a vessel insured on time, existed in England, but of that fact the witness had no personal knowledge. The plaintiffs further proved by the said Karthaus, that he had been informed by others, that several merchants in Baltimore, whose vessels had * been insured on time, and upon their arrival in Baltimore, whose sails had been sent to the sail lofts for repair, and which were destroyed by fire, were, as he heard from others, paid for their loss by the insurers. The witness further stated, that he had no knowledge of any usage in such cases in the City of Baltimore, except as deduced from the above fact and information, and knew of no usage, *pro* or *contra*, in regard to vessels unfinished, or vessels being built in Baltimore.

The defendants then by their counsel moved the Court for its opinion and direction to the jury.

If the jury shall believe from the evidence in this cause, that the spars, blocks, rigging and other materials and work, for the value of which this suit is brought, were never in fact put upon the barque Orb, upon which the insurance in this cause was affected, prior to the accident by fire proved in this cause, that the plaintiffs are not entitled to recover under the policy in this cause, notwithstanding the jury may believe from the evidence that the said spars, blocks, rigging and other materials, were intended to be put upon the barque, and would have been put upon said barque if said accident by fire had not occurred.

The plaintiffs then moved in like manner the following prayer:

That if the jury believe from the evidence, that the blocks, spars, rigging and other articles destroyed by fire, as set forth in the evidence, were actually delivered to the plaintiffs in a finished state by the parties furnishing the same, for the purpose of being forthwith put upon the barque Orb, and were the property of the plaintiffs as owners of the said barque, and if not insured would have been their exclusive loss, and were deposited in places near the said vessel, convenient for the then intended use thereof, and in the manner usual and customary in cases of building vessels in this city, then the plaintiffs are entitled to recover, notwithstanding the said articles had never actually been put on board, or fitted to the said vessel.

*The Court [MAGEUDER, A. J.] granted the prayer of the defendants, and rejected the prayer of the plaintiffs. The plaintiffs excepted.

The verdict and judgment being for the defendants, the plaintiffs appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

N. Williams, for the appellants. *St. Geo. W. Teackle*, for the appellees.

ARCHER, J. delivered the opinion of this Court. We agree with the Court below, that the policy did not cover the articles, for the loss of which by fire, this suit was instituted to recover.

We have no proof of usage in the port of Baltimore, in relation to this subject, which would control or govern the contract of the parties. What was the usage in other ports of the Union, could not be considered as entering into the views of the parties in the formation of the contract.

The case must, therefore, be decided by the language which the parties themselves have used in the covenant of insurance.

This is a valued policy "on a new barque now being built," and the question is, what do these words import; do they apply to the ship and such materials as from time to time are placed upon her in a process of construction, or are they to be considered of more extensive signification, and as covering whatever materials were brought into the ship yard, and were necessary to her construction, whether fitted and prepared or not, to be placed upon the vessel, though not placed on the ship, or in any way attached to it, or as constituting in fact, a part of the *corpus* insured?

This is a case of the first impression in this State. No cases have been cited, bearing upon the question directly. The contract of insurance is, it is true, one of indemnity, but the terms of it ought not to be carried beyond their ordinary and legitimate signification. The extent of this indemnity is *to be ascertained, by arriving at the true intention of the parties, as expressed by the words they have used. The thing insured, "is a new barque now being built," and the design of the parties was to cover the ship in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be her progress towards completion, when the fire occurred. 473

The articles, the value of which is claimed, it is proved, were made for the ship, and were in the ship yard, and were in a condition to be fitted and attached to the vessel, if she had been ready to receive them. But they never had been placed upon or fitted to the vessel, so that the policy could attach to them.

Authorities have been cited to show, that an insurance on ship, covers her tackle, apparel and furniture, *ex vi termini*, and that the sails of a vessel, taken on shore for repair, are also covered, there being a usage proved, that vessels engaged in such trade, removed their sails from the ship for repair.

But these cases do not, we apprehend, apply to this case, where the insurance is not on a ship, but on a barque being built, and by which the articles alleged to be insured never constituted a part, and where there is no usage in the port of Baltimore where the insurance

was effected, to show that the articles lost were considered within the terms of the policy.

In short, we believe that the insurance in this case covered the barque itself, as it then lay on the stocks at the time of the insurance, and operated on such materials as should be from time to time in a course of construction, put upon and attached to the vessel, so that they might be considered as a part of the vessel.

Judgment affirmed.

474 * JOSEPH HARRIS, Executor of GWINN HARRIS *vs.* ETHEL-
DRA J. HARRIS.—December, 1842.

Where the legatee of personal property dies before, and his widow survives, the testator, she is entitled to the same proportion of it, as if her husband had also survived him, and died intestate, as where there are children, to one-third part.

APPEAL from the Orphans' Court of Charles County. The appellee filed her petition before the said Court, alleging that Gwinn Harris died in the year 1837. By his will, after bequeathing to his sisters Kitty Vincent and Violetta Barbour, each an annuity of \$200 for life, and various legacies to nephews and nieces, he devised as follows:

"I give and bequeath to my brothers, Joseph Harris, John Francis Harris, Nathan Harris and Morgan Harris, and their heirs, executors, administrators and assigns, all the rest and residue of my estate, both real and personal, to be equally divided amongst them, in equal proportions, share and share alike."

The will then appointed Joseph Harris to be sole executor; was executed on the 9th June, 1834, and admitted to probat on the 22nd August, 1837.

The petition alleged, that Morgan Harris, one of the legatees, died in 1835, intestate, before the testator Gwinn Harris, leaving the appellee, his widow, and the following children: Thomas B. and Gwinn Harris, of full age, and Nancy, John G. and Chapman Harris, minors, and prayed the order of the Court to direct in what manner distribution is to be made amongst the representatives of Morgan Harris, deceased.

Joseph Harris, executor, under the will of Gwinn Harris, answered the petition—admitted the facts alleged, but contested the right of the appellee to any portion of the property bequeathed to her late husband, and maintained that his children were exclusively entitled.

The Orphans' Court decreed *pro forma*, that the executor of G. H., in the distribution of his personal estate, pay to the appellee, his widow, one-third part of one-fourth of the residue of said estate.

475 * Joseph Harris, the executor of Gwinn Harris, appealed to this Court.

The cause was submitted on notes to BUCHANAN, O. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

P. W. Crain, for the appellant. This is an appeal from the Orphans' Court of Charles County, from a *pro forma* judgment, made upon petition, by the consent of parties. It is an amicable proceeding, instituted for the purpose of satisfying some of the legatees upon the question, whether the widow of Morgan Harris is entitled to a share of the personal estate of Gwinn Harris. Gwinn Harris executed his last will and testament in June, 1834, which was duly admitted to record in the Orphans' Court of Charles County, by which he bequeathed to Morgan Harris one-fourth of his estate, after deducting the payment of certain legacies. Morgan Harris died in 1835, leaving a widow and five children. Gwinn Harris, the testator, survived Morgan Harris, and departed this life in August, 1837. By consent of parties, the Orphans' Court of Charles County decreed, that Etheldra J. Harris should be paid by Joseph Harris, the executor of Gwinn Harris, one-third part of one-fourth of the residue of the personal estate of Gwinn Harris.

It is contended by the children of Morgan Harris, that his widow is not entitled to any portion of the personal estate of Gwinn Harris. No right or estate in the property was transmitted to Morgan Harris, in his life-time, and that his widow, Etheldra J. Harris, cannot legally claim, except through her husband, Morgan Harris. Morgan Harris had not such an interest in the property devised by Gwinn Harris, as to have devised or transferred it by any act of his. The time of the transfer of the property is the death of the testator. The Act of 1810, chap. 34, was designed to remedy inconveniences growing out of the death of legatees before the will could operate. 7 G. & J. 366.

The estate and interest devised and bequeathed by Gwinn Harris to Morgan Harris will not be considered assets of *Morgan Harris, to go into the hands of his administrator, and to be distributed by him, but is transferred to those who are entitled to the same, as his next of kin. 476

It is contended, that as the legacy does not constitute a part of the personal estate of Morgan Harris, his widow is not entitled to any portion of it.

T. S. Alexander, for the appellee. Morgan Harris, the legatee, having died in the life-time of Gwinn Harris, the testator, the question arises, who are entitled to the legacy bequeathed by the last will of the latter to the former? The Orphans' Court of Charles County decreed, that it should be distributed amongst the widow and children of the legatee, deceased, who were at the time of the testator's death, the representatives of the legatee, and as such, entitled to distribution of his personal estate. The present appeal is taken to contest the right of the widow to any share of this legacy, on the ground, as it would seem, from the statement filed on behalf of the appellant, that she is not one of the next of kin of her deceased hus-

band. The answer to this objection is short, and it is believed, conclusive. There is nothing in the Act of 1810, chap. 34, nor in the opinion of this Court, in the case of *Glenn vs. Belt*, 7 G. & J. 363, which requires the distribution in such case to be made amongst "the next of kin" of the deceased legatee. The Act provides generally, that no legacy shall lapse by reason of the death of any legatee, in the life-time of the testator; but every such legacy shall have the same effect and operation in law, to transfer the right, estate, or interest in the property mentioned in such bequest, as if such legatee had survived the testator. And the opinion delivered in the case above referred to, shows, that the effect and operation of the Act is to transfer the legacy "to such persons *in esse* (at the death of the testator as are) entitled, by law to the distribution of the legatee's estate, in case of intestacy, that is, his representatives." Who are the representatives? That is, who would be entitled by law to share in the distribution of the estate of the legatee, in case he had died intestate * immediately after the death of the

477 testator? and not who were at that time his next of kin? is the proper inquiry. Now the Act of 1798, chap. 101, sub chap. 11, secures to the widow where the intestate left children, one-third part, and if he left no children, one-half part of the residuum of his estate. She is then "a representative," and as such, "entitled by law to share in the distribution" of her deceased husband's estate.

BY THE COURT—

Decree affirmed.

WILLIAM RICHARDSON *vs.* MICHAEL STILLINGER.—December, 1842.

By the well established practice of the Court of Chancery, no cause is ready for hearing, until the commission under which testimony has been taken, has been returned to the Chancery office, and there remained for the period of one entire term.

By the rules of Baltimore County Court, the commission and testimony must remain in Court for the period of twenty days before the case is ready for hearing.

Where a commission was sued out on the 14th; returned on the 17th; removed to the Court of Chancery from B. County Court on the 22nd, and a decree passed on the 24th of the same month, the decree was prematurely passed under the Act of 1820, chap. 161.

The general rule is, that a Court of equity is not to be resorted to for redress where full and complete remedy may be obtained at law.

There are some subjects over which Courts of law and equity exercise concurrent power; such as fraud and matters of account.

Where plain, adequate and complete remedy may be had at law, a Court of equity ought not to be resorted to.

If the personal estate of a deceased vendee is sufficient to discharge the ven-

dore's equitable lien for a balance of unpaid purchase money, due for land sold, the real estate ought not to be sold for that purpose.

A bill in equity can be filed to enforce the vendor's lien, only when the complainant has exhausted his remedy at law, or where he avers such facts as will show, that he cannot have a full, complete and adequate remedy at law. (a)

In requiring a vendor to exhaust his legal remedies, or show that he has none before proceeding in equity to enforce his equitable lien for the unpaid balance of the purchase money, he is not required to proceed by ejectment to re-possess himself of the land sold; nor by way of attachment or *fi rei facias* to seize and sell the land sold by him in the hands of the vendee.

A Court of equity never requires a complainant to do a nugatory act, nor an act which may impair his equitable rights.

* A sale by a vendor of the land sold to his vendee by execution, would be subject to all judgments, liens and outstanding equities, existing anterior to the date of the judgment against such vendee, and upon which the execution issued. (b) 478

APPEAL from the Court of Chancery. On the 29th May, 1841, Michael Stillinger filed his bill on the equity side of Baltimore County Court, alleging, that on the 6th October, 1840, he sold to William Richardson a lot of ground in the City of Baltimore, &c., for the sum of \$3,560, to be paid one-third in cash, two-thirds in six and twelve months, with interest; that Richardson made the cash payment, and executed his two obligations for the credit payments; that the note at six months is long since due and unpaid, though payment has been often demanded. Prayer for a decree for a sale and payment of the balance of the purchase money. A subpoena was issued, and the appellant appeared to the cause, but neglecting to file an answer, a commission was ordered and issued on the 14th September, 1841. The sale was proved, and the notes of the appellant for the purchase also proved, and filed with the commission on the 15th September, 1841. On the 22d of that month, the cause was moved to the Court of Chancery, on the application of the complainant. On the 24th September, 1841, the Chancellor [BLAND,] decreed a sale. On the 11th January, 1842, the defendant appealed to this Court.

(a) Approved in *Stull vs. Hurtt*, 9 Gill, 450; *Eyler vs. Crabbs*, 2 Md. 154; *Ridgeway vs. Toram*, 3 Md. Ch. 308. Cf. *Pratt vs. Van Wyck*, 6 G. & J. 333; *Magruder vs. Peter*, 11 G. & J. 148; *Elys ville Co. vs. Okisko Co.* 1 Md. Ch. 392. It is provided by Rev. Code, Art. 66, sec. 5, that a Court of equity may decree a sale to enforce a vendor's lien upon any estate in lands, whether legal or equitable, or may decree a sale to enforce any other equitable lien thereon, although the complainant may have a perfect remedy at law for the money for which the lien is claimed.

(b) Approved in *Hall vs. Jones*, 21 Md. 447; *Manton vs. Hoyt*, 43 Md. 265; *Wilhelm vs. Lee*, 3 Md. Ch. 3, 324; *Conkling vs. Wash. Univ.* *Ibid.*, 509.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

Murray, for the appellant.

No counsel appeared for the appellee.

STEPHEN, J. delivered the opinion of this Court. This case originated on the equity side of Baltimore County Court, and was removed to the Court of Chancery in virtue of an Act of Assembly, passed for that purpose in the year 1824, chap. 196, and by a rule of the Court of Chancery, passed in the following year, it was to be proceeded in, heard and determined, in like manner as if it had been originally instituted in that tribunal.

479 * By the well established practice of that Court, it is understood, that no cause is ready for hearing, until the commission under which testimony has been taken, has been returned to the Chancery office, and there remained for the period of one entire term. According to the rules of Baltimore County Court, the commission and testimony must remain in Court for the period of twenty days, before the case is ready for hearing. The commission in this case, it appears, was issued on the 14th day of September, 1841; was returned on the seventeenth day of the same month. The cause was removed to the Court of Chancery on the 22d September, 1841, and the decree passed in that Court on the twenty-fourth of the same month. The Act of 1820, chap. 161, under which the commission in this case issued, provides, that the commission which shall be issued for the taking of testimony to support the allegation of the bill, "shall be issued, proceeded in, and returned in the same manner, and the testimony taken and returned under it, shall have the same effect as if issued and returned in the usual way, on answer, general replication and issue, and the Court shall proceed to a final decree, in the same manner as if the defendant or defendants had appeared and put in their answer." Under this view of the case, it appears that the decree of the Court below was passed prematurely, and before the cause stood regularly for hearing before that jurisdiction, according to the provisions of the Act of Assembly, and its established practice in such cases. The decree of the Chancellor was therefore erroneous, and ought to be reversed.

It was also contended by the appellant, that the appellee had full and adequate remedy at law, and therefore, should not have resorted to a Court of equity for relief. Whether, under the circumstances of his case, a Court of Chancery was the proper forum to administer justice for the wrong of which he complained, is a question of no inconsiderable magnitude, in point of principle, and is not entirely free from difficulty. The general rule no doubt is, that a Court of equity is not to be resorted to for redress, where full and complete remedy may be obtained at law; and that of most of the judicial

controversies * between man and man, a Court of law is the proper tribunal to take cognizance. At the same time, it **480** must be admitted, that there are many questions arising in the administration of civil justice, the decision of which belongs exclusively to a Court of equity, as the appropriate jurisdiction. It is likewise true, that there are some subjects over which a Court of law and equity exercise a concurrent power, such as fraud and matters of account. Conformably to this view of the line which separates the two jurisdictions, and which ought always to be maintained inviolate; the Congress of the United States, in organizing the judiciary department of the Federal Government by the Act of 1789. provided, "that suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law." This is the rule adopted by the Federal Courts in the administration of equity jurisprudence, and it would seem to be the true doctrine which ought to prevail wherever the principles of law and equity are administered by separate, distinct and independent jurisdiction as different parts of the same system. In *2 Henning & Mumford Rep.* 146, that distinguished jurist, Judge Roane, speaking upon the subject of the relative powers of Courts of law and equity, holds the following impressive and emphatic language—"considering the natural and progressive tendency of the jurisdiction of the Chancery to encroach upon that of the common law Courts, and thus not only to lose the advantage of jury trial, and *viva voce* examinations, but also to give a man the benefit of his own testimony, that jurisdiction, however salutary and valuable, should not be extended to the overthrow of the jurisdiction of the Courts of common law, nor ought the land-marks established by this Court in relation to this subject, lightly to be departed from." So in the 4th volume of the same Reports, page 470, the Chancellor for the Superior Court of Chancery for the Richmond district, speaking upon the subject of his own jurisdiction, expresses himself in the following terms: "If the law affords an adequate remedy in this case, the application to this Court is improper; but if the law does not, this is then the * proper Court." Again, **481** in 471, he says—"the true course for a Chancellor is never to interpose, if the matter can be adjusted at law, and the best interests of the people requires that this rule should be adhered to." These are some of the views which seem to prevail in the Courts of a sister State, upon this important and interesting subject; and they are not novel in their character, but in perfect consonance, it is believed, with those which have always been entertained by our own tribunals.

In the case of *Pratt vs. Vanwyck's Ex'rs*, 6 G. & J. 495, the learned Judge who delivered the opinion of the Court in the course of his reasoning, lays down the following principle: "If the vendor can, by any proceeding at law, recover the amount due him, Chancery never

interferes to enable him to assert his equitable lien. His remedy at law must be first exhausted, or it must be shown that none exist there." For the support of which doctrine he refers to 1 *John. C. Rep.* 308. That was a bill to enforce the vendor's lien, who had conveyed the legal title, after an ineffectual attempt to recover the purchase money at law, against the personal representative of the vendee, who pleaded *plene administravit* to the suit, and the plaintiff being unable to prove assets in her hands, took judgment for assets *in futuro*, for the amount of his claim, and the costs of suit. In that case Chancellor Kent says—"The failure of the personal estate is sufficiently shown in the first instance, and there is nothing to gain-say it; and I shall accordingly decree a sale of one-third of the house and lot towards satisfaction of the note;" the one-third of the house and lot being the thing sold, for which the note was given. If the complainant was entitled to go into equity in the first instance, to enforce his equitable lien, the failure of the personal estate was in that case a matter of no importance in the assertion of that right. In the case of a mortgage, where the creditor is under no obligation to look to the personal estate of his deceased debtor, the personal representative need not be made a party. See 2 *H. & G.* 97. In 6 **482** *G. & J.* 107, this Court seem to have entertained the *same views as to the liability of the personal estate in the first instance, and that was a case where the legal title had been retained by the vendor, who had only given a bond of conveyance. The Court there say—"In the event of the personal property proving insufficient to pay the complainant's claim, the land would have to be sold for the purpose of paying the purchase money." Again, they say in the same case—"For such excess the complainants would have clearly a lien for the purchase money, and could recover it by a sale of the land, unless the administrator has assets wherewith to discharge and pay the purchase money." The irresistible inference of course to be deduced from those principles was, that if the personal fund was sufficient to discharge the equitable lien, the real estate could not be sold for that purpose. These views of this Court are sustained by the very respectable authority of *Sugden on Vendors*, 394, 395, where he says—"On sale of the estate, the purchase money becomes a debt, payable out of the purchaser's personal estate, and the equitable lien ought, it is conceived, to be extended to only so much of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient." If this doctrine be correct, and it is cited with approbation by *Cross on Law of Lien*, 77, 98, it proves to demonstration, that the personal estate of the purchaser is the primary fund for the payment of the vendor's claim, and that the real estate is only to be auxiliary to it as a secondary fund, when the personal estate shall prove inadequate. A bill in equity can therefore be filed to enforce the

vendor's lien only, when the complainant has exhausted his remedy at law, or where he avers in his bill such facts as will show, that he cannot have a full, complete and adequate remedy at law. In requiring the vendor to exhaust his legal remedies, or show that he has none, before proceeding in a Court of equity to enforce his equitable lien for the unpaid balance of purchase money, we are not to be understood as requiring him, where such a remedy is open to him, to proceed by ejectment to repossess * himself of the land sold. A recovery in such an action is no adequate 483 remedy for the recovery of the money due. Nor do we require the vendor by way of attachment or *fiery facias*, to seize and sell the land purchased, in the hands of the vendee. A Court of equity never requires a complainant to do a nugatory act, nor an act which may probably work injustice, or impair his equitable rights. Such a seizure and sale could only transfer the interest of the vendee, at the date of the judgment, or of the issuing or levying of the attachment, and would be subject to all judgments, liens, and outstanding equities, existing against the vendee anterior to that time. All such secret or unknown equities would remain unimpaired by such a judicial sale. The benefit resulting to the vendor by the sale, might not, therefore, be commensurate with his equitable lien, and he would afterwards come with an ill grace into a Court of equity, (if indeed he could come at all,) seeking to sell the original entire interest of the vendee in the property, and thereby annihilate the title of a purchaser acquired under a judicial sale, made at his, the vendor's instance, and for his benefit.

There are two cases which have been decided in this Court, to be found in 10 and 11 G. & J. the first at page 387, the last at page 103. These were cases marked by peculiar circumstances. The vendors in both cases were out of the State, and beyond the jurisdiction of our Courts of law, after the purchases were made, and in the first case, the vendee, previous to his departure, had conveyed all his estate, of every description, in contemplation of marriage, to the separate use of his intended wife, to whom he was afterwards actually married. In this case the decree of the Chancellor dismissing the complainant's bill was reversed by the Court of Appeals: the bill of complaint taken *pro confesso*, and the land decreed to be sold for the payment of the purchase money. In the second and last case, the bill charged that the complainant had no means of obtaining the money due for the land sold, except by enforcing his equitable lien; an order of publication was passed and published, and the Chancellor dismissed the bill, on the ground, that he had no jurisdiction, because the * complainant had a remedy in a Court of law. The Court of Appeals reversed the decree of the Chan- 484 cery Court, and remanded the cause for further proceedings. In neither of these cases was there that plain, adequate and complete remedy at law, which would oust the jurisdiction of a Court of equity,

and therefore, the equitable lien was properly enforced, to compel payment of the purchase money. In the present case, it does not appear that any obstacle existed to preclude or render unavailing a legal remedy for the recovery of the purchase money; and therefore, the Court of Chancery had no jurisdiction to administer relief.

Decree reversed.

MICHAEL DOYLE *vs.* THE COMMISSIONERS OF BALTIMORE COUNTY.—December, 1842.

By the Act of 1838, chap. 392, sec. 3, every deposit of money as a wager or bet upon elections, is forfeited, and to be paid over to the Levy Court or County Commissioners of the county. The forfeiture attaches to the deposit the moment it is made, and the Courts or Commissioners may recover the same in their own names. (a)

This being the public law of the land, a knowledge of it is imputed to every person in whose hands such a deposit is made.

No notice or warning is necessary to prevent the payment of the deposit to the parties to the bet. If such payment be made, it is at the risk of the person making it.

Where the plaintiff, in an action to recover a forfeiture, erroneously deemed it essential to give notice to the defendant not to part with the thing forfeited, evidence for that purpose improperly admitted by the County Court, is not such an error as will induce this Court to reverse the judgment upon appeal. It did the appellant no injury. (b)

The deposit of a note of the Bank of Virginia, as a wager or bet, is a deposit of money within the Act of 1838, chap. 392. (c)

Where the Court cannot grant the entire prayer as made, though a portion of it in a separate, distinct form, might have been given, it is not error to reject the whole. (d)

In an action to recover the forfeiture of the deposit under the Act of 1838, the jury may award damages equal to the value of the money forfeited.

It is not essential to a recovery under the Act of 1838, that both parties to the bet should deposit money. If either make such a deposit it is forfeited, though the deposit of the other may not be forfeitable.

485 * In an action of debt to recover a statutory penalty, the defendant moved in arrest of judgment, because the declaration did not conclude "against the statute in the case made and provided;" nor contain any "averment that the offence was committed contrary to the statute on which the suit was brought," nor any "averment that the offence was committed contrary to any statute," but *Held*, that the words "whereby and by force of the statute in such case made and pro-

(a) See Rev. Code, Art. 5, s. 35, *et seq.*; *Wroth vs. Johnson*, 4 H. & McH. 182.

(b) Approved in *Emery vs. Owings*, 3 Md. 187.

(c) See *Towson vs. Havre de Grace Bank*, 6 H. & J. 45.

(d) Approved in *Berney vs. Tel. Co.* 18 Md. 857; *Kettlewell vs. Peters*. 23 Md. 316.

vided, the said sum became forfeited" found in the *narr.* were a sufficient compliance with the rules of pleading.

APPEAL from Baltimore County Court. This was an action of debt to recover the sum of \$200, brought by the appellees on the 9th April, 1841, who declared, that whereas, on the 1st day of October, in the year eighteen and forty, at the county aforesaid, a certain William Doebaker, and a certain John Crandall, did bet and wager each the sum of one hundred dollars, upon the result of the election of Electors of President and Vice-President of the United States, in the State of Pennsylvania, to take place on the thirtieth day of October, in the year aforesaid. And whereas, the said parties did then and there deposit, each the sum of one hundred dollars, being the sum of money so bet and wagered as aforesaid, in the hands of the said Michael Doyle, as a deposit of the sum so bet, and between them. And whereas, the said William Doebaker, did then and there, assign and transfer all his right, title and interest in and to the said bet and wager, and in and to the money deposited as aforesaid, in the hands of the said Michael Doyle, unto a certain William Snyder, of the county aforesaid; whereby and by force of the statute in such case made and provided, the said sum of two hundred dollars, then and there so deposited, in the hands of the said Michael Doyle, became forfeited and payable to the Commissioners of Baltimore County, for the use of primary schools in the said county; of all which premises the said Michael Doyle then and there had notice. Whereby an action hath accrued to the said commissioners to demand and have for the use of the said primary schools of said county, of and from the said Michael Doyle, the said sum of two hundred dollars. Nevertheless, the said Michael Doyle, although, &c.; but to pay the same, * or any part thereof, the said Michael Doyle hath hitherto refused, and still doth refuse, to the damage of **486** the said commissioners of Baltimore County, three hundred dollars, and therefore they bring suit, &c. The defendant pleaded *nil debet*, and the jury found a verdict for the plaintiff of \$200, &c.

The defendant moved in arrest of judgment for the following reasons:—

1st. Because the declaration in this cause does not conclude against the statute in the case made and provided.

2nd. Because the declaration contains no averment that the offence was committed contrary to the statute on which the suit was brought.

3rd. Because the declaration contains no averment that the offence was committed contrary to any statute.

4th. Because of other matters apparent on the record.

The County Court rendered judgment for the plaintiffs.

1st Exception.—At the trial of this cause, the plaintiffs gave in evidence by a competent witness, that a certain William Doebaker,

In October, 1840, by the hands of Henry Snyder, deposited in the hands of the defendant, a one hundred dollar bank note as a bet, on the issue of the Presidential election, then soon to take place in the State of Pennsylvania; that defendant stated at the same time a like sum was deposited as a bet against it, but that witness did not know by whom it was made, but afterwards understood it was John Crandall; that before the election Doe-baker assigned his interest in said bet to said Snyder; that shortly after the election took place, and before the returns came in, Snyder called on the defendant and warned him not to pay over the deposit without both parties were present, which defendant promised accordingly. And for the purpose of shewing a further warning to the defendant against paying over the said deposit to the supposed successful party, the plaintiffs offered in evidence a warrant issued by a justice of the peace at the suit of W. Snyder, for the recovery of the \$100 deposited by Doe-baker, and assigned as aforesaid, dated 17th November, 1840.

487 * To the reading of which warrant in evidence for the purpose aforesaid, the defendant excepted, and his exception was overruled by the Court, [MAGRUDE, A. J.]

2nd Exception.—In addition to the evidence in the first bill of exceptions, which it is agreed shall be incorporated into and made a part of this exception, the plaintiffs further gave in evidence, that the said Crandall was present at the trial before the magistrate on the aforesaid warrant, and acted as if interested therein, and that on the hearing of the appeal in this Court from the decision of the magistrate, the said Crandall was present and acted as if interested therein, and gave directions to the counsel of defendant, and conferred with him on the trial. And the plaintiffs, in order to show that the defendant was warned not to pay over the deposit to Crandall, or to the successful party, and that he was advertised that the same was forfeited to the plaintiffs, the plaintiffs gave in evidence by the counsel who acted for Snyder in the aforesaid trial, that Baltimore County Court decided on said appeal, and distinctly announced the fact, that neither of the betting parties was entitled to the sums deposited, but that the same was forfeited to the plaintiff; and also gave in evidence, that the counsel for the defendant was present and heard the decision of the Court; to the offering of which said evidence, the counsel for the defendant excepted, and his exception was overruled by the Court.

3rd Exception.—In addition to the testimony offered in the preceding bills of exceptions, which it is agreed shall be incorporated in this, the plaintiff's third bill of exceptions, the plaintiff further gave in evidence by a deputy sheriff, that when the subpoena on the aforesaid appeal was served on the defendant, which summons bears date the 4th of January, 1841, the defendant admitted that he then held the deposit of the bet aforesaid, and stated that it was Crandall's affair, and wished that he could get rid of the affair. The

plaintiffs further gave in evidence by the same deputy sheriff, that when the defendant was served with the original writ in this case, his impression is, the defendant made the same admission as when * he was served with the aforesaid subpoena. And the plaintiff further gave in evidence, that on the trial before the 488 magistrate on the aforesaid warrant, the said Crandall was present, acting as the agent of said Doyle, (but the plaintiffs gave no further evidence of his agency,) and that the said Crandall did not object that the money had been paid over by Doyle to him, or that the said Crandall did not deposit \$100 for his bet; and further, that on the trial in County Court, on the appeal aforesaid, the attorney of Doyle did not object that the money had been paid over, or that Doyle did not receive Crandall's bet of \$100; to the admissibility of any and all which testimony, the defendant objected, and his objection was overruled.

4th. Exception.—The defendant, to sustain the issue on his part, offered testimony that the stake deposited by Doebaker, was a \$100 note of a Virginia bank, which the defendant receiving, wrapped up in a piece of paper and laid it aside by itself; that at that time, the Virginia banks had suspended specie payments, and that their notes were one and a quarter or one and a half per cent. below the value of Baltimore bank notes, and that the Baltimore bank notes were two and a half per cent. below specie; that said Virginia notes would not at that time be received in the banks of Baltimore on deposit, or in the payment of notes due in said banks. The defendant further offered in evidence by James Smith, Jr., that he is now, and was at the time of the making of the bet aforesaid, the clerk of the defendant; has access to all his books, and knows that said Crandall did not deposit any money with Doyle, but put up the bet of Crandall of \$100, by charging the account of said Crandall with that amount of notes then on deposit with said Doyle, belonging to Crandall, which said notes were notes of individuals, made since the suspension of specie payments in the year 1834, all of which were under the denomination of \$5, commonly called shinplasters, and were then in circulation in the community as currency. The defendant further offered in evidence by the said Smith, that shortly after the Presidential election in 1840, in the State of Pennsylvania, there were for many days contradictory rumors as to the issue * of that election; 489 that in a week after it was finally ascertained how the election had gone in that State; he was told by the defendant that the bet had been paid over to Crandall, and that on one occasion, shortly after the said Pennsylvania election, he recollects he heard the defendant remark to a gentleman in the presence and hearing of Crandall, that he had paid over to Crandall the aforesaid bet, and that Crandall did not deny it. And the plaintiffs further proved on the cross-examination of the defendant's witnesses, that Virginia bank notes and the shinplasters referred to above, passed current

from hand to hand in the City of Baltimore, and in purchases up and down the streets; that Crandall had constant dealings with the defendant before October, 1840, and continually from that time down to within two months of the present time; that Crandall deposited shinplasters with the defendant, and drew out from time to time from defendant, Baltimore bank notes, Virginia bank notes, and the various kinds of currency afloat in the community.

Whereupon, upon the whole testimony in the preceding bills of exceptions, which it is agreed shall be incorporated into this bill of exceptions, and made a part thereof, the defendant prayed the opinion and direction of the Court to the jury—

1st. That if the jury believe from the evidence, notes were deposited, and not money, then the plaintiffs cannot recover.

2nd. If the jury believe that a bank note or bank notes were put up on one side, and notes of private individuals under the denomination of five dollars, made since the suspension of specie payments in the year 1834, and then in circulation in this community as currency, were put up on the other side, the plaintiff cannot recover.

3rd. If the jury believe that the notes staked were of less value than \$200 in gold or silver, or either, the plaintiffs cannot recover.

4th. If the jury believe that the bet was paid over to Crandall before this suit was brought, the plaintiffs cannot recover in this action.

* 5th. If the jury believe that the deposit made with Doyle **490** by Doebaker, was a bank note of a Virginia bank of the denomination of \$100, and at the time said note was deposited, the bank which issued it had ceased to redeem its issues in gold and silver, and that said note by reason of the failure of said bank so to redeem its issues depreciated in value, and would not be taken in payment of debts in the City of Baltimore, then the plaintiffs are not entitled to recover.

6th. And if the jury shall believe the facts stated in the last prayer, and that Crandall, at the time he gave orders to Doyle to put up \$100 for him, had no other funds to his credit with Doyle but the issues of individuals, such as are described in the second prayer of the defendant in this bill of exceptions, and that the deposit of said Crandall was made by the said Doyle's charging the account of said Crandall with issues as aforesaid, amounting to one hundred dollars of said issues, then the plaintiffs are not entitled to recover.

And the plaintiff thereupon moved the following ten prayers:

1st. That if the jury believe from the evidence, that there was a deposit made with the defendant of \$200 in the manner set out in the declaration, the same was forfeited to the plaintiffs for the purposes provided in the 3rd sec. of the Act of 1838, chap. 392.

2nd. That no payment over by the defendant to Crandall, at any time, (even if the jury should believe from the evidence there had been such payment,) furnishes any defence in this action.

3rd. That no payment over by the defendant to Crandall, after the warning not to do so by Snyder, and his promise not to do so, (if the jury believe such warning and promise,) furnish any defence in this action.

4th. That no payment over by the defendant to Crandall, after service on defendant of the warrant given in evidence, dated the 17th November, 1840, furnishes any defence in this action.

5th. That no payment over by the defendant to Crandall, after the decision of Baltimore County Court, at January Term * last, in the case of *Snyder vs. the defendant*, furnishes any defence **491** to this action.

6th. That no payment over of the deposit by defendant to Crandall, after being served with the writ in this case, furnishes any defence to this action.

7th. That bank notes (if the jury believe such was the character of the deposit in question,) constitute a part of the common currency of the country, and ordinarily pass as money, that they are to be regarded in the ordinary concerns of this community as money, and are to be considered and treated as money.

8th. That if the jury believe from the evidence, that the defendant received \$100 from Snyder as a deposit of a bet, to be met with a like amount from Crandall, or some other party, and that he held out the impression to Snyder that a sum of \$100 had been placed against Snyder's \$100, that then the defendant is estopped from setting up in defence of this action, that there had been no correspondent sum of \$100 deposited with him.

9th. That the defendant having offered proof that he had paid over the \$100 deposited with him by Snyder, as stated in the declaration to Crandall, as the winning party, he is estopped from setting up in defence of this action, that Crandall had made no correspondent deposit of a like sum of \$100.

10th. That if the jury believe from the evidence that Crandall was in the habit of depositing money with the defendant before the deposit of the bet as set forth in the declaration, and afterwards, from time to time, down to some months since the institution of this suit, and that the defendant had thus an opportunity of reinstating himself in possession of the amount of the deposit, that then no payment at any time over to Crandall, of the special money so left on deposit, (should the jury even believe there was such payment over,) affords an objection to a recovery by the plaintiffs of the amount so deposited.

The Court, [MAGRUDER, A. J.] refused to grant the six prayers, or either of them offered by the defendant, and granted the seven first prayers offered by the plaintiffs, but refused to * grant the 8th, 9th and 10th prayers offered by the plaintiffs. To the **492** refusal of which six prayers of the defendant, and the granting of the first seven prayers of the plaintiffs, the defendant excepted.

The verdict and judgment being for the plaintiff, the defendant prosecuted this appeal.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

Addison, for the appellant. *Williams*, for the appellee.

DORSEY, J. delivered the opinion of this Court. By the third section of the Act of 1838, chap. 392, every deposit of money as a wager or bet upon elections, is forfeited, and to be paid over to the Levy Courts or County Commissioners of the county. The forfeiture attaches to the deposit the moment it is made. For this, see *Gelston vs. Hoyt*, 3 *Wheat*. 311, and the authorities there referred to. This being the public law of the land, a knowledge of it is imputed to every person in whose hands such a deposit is made. No notice or warning therefore, is necessary to prevent the payment of the deposit to the parties to the bet. If such payment be made, it is at the risk of the person making it, who must abide the consequences of his unauthorized act. It hence follows, that the County Court erred in permitting the warrant to be read to the jury, as stated in the appellant's first bill of exceptions, it being irrelevant to the issue which the jury were sworn to try. But for this error, their judgment ought not to be reversed. The appellant could sustain no injury from the reception of the testimony objected to. Its admission conferred on him a benefit, rather than inflicted an injury, as the jury might thereby reasonably infer, that to entitle the appellees to recover, they must prove a warning or notice to the appellant, not to pay over the deposit to the winning party to the bet. The remarks made on the first bill of exceptions are equally applicable to the second bill of exceptions. The * testimony there objected to, **493** and admitted by the Court, being offered to prove a warning to the appellant, not to pay over the money to Crandall, and a notice to him, that the appellees were entitled thereto.

The testimony permitted to go to the jury in the third bill of exceptions, so far as it tended to prove the receipt of the deposit by the appellant, was properly received by the Court, but such parts of it as were offered to disprove the payment of the deposit to Crandall, were impertinent to the issue, and therefore inadmissible. But its only effect being to establish a fact wholly immaterial to the issue in the cause, and not injurious to the appellant, its reception by the Court is no ground for the reversal of the judgment. The testimony thus improperly received, could work no detriment to the appellant, but might have redounded to his benefit, by inducing the jury to believe, that if the deposit were without warning, or notice of the claim of the appellees, their verdict must be for the appellant.

The first prayer in the appellant's fourth bill of exceptions, calls on the Court to instruct the jury, that if they "believe from the evi-

dence that notes were deposited and not money, then the plaintiff cannot recover." If by notes is to be understood the promissory notes of the parties to the wager, or of other persons, the Court were fully justified in refusing the prayers; because, by the uncontradicted evidence in the cause, the stake deposited by Doebaker, was a hundred dollar bank note of the Bank of Virginia, and therefore, the evidence before the jury did not warrant the Court in granting the instruction prayed. But if by notes were meant bank notes, as the argument on both sides assumes, then the prayer was properly refused. This Court, in the case of *Towson vs. The Havre de Grace Bank*, 6 H. & J. 53, having said that the objection, "that bank notes are not money, cannot be sustained; they answer all the purposes of money in the ordinary concerns of the community; by common consent they are treated as money, in the payment of debts, the purchase of goods and lands, and in the every day transactions between man and man, and at this hour can only be considered as such. They are a *legal tender, unless especially 494 objected to at the time, and will pass by will under the general description of money"—as "all my money in such a drawer." And the same doctrine is to be found in *The Bank of the United States vs. The Bank of Georgia*, 10 Wheat.

We approve of the refusal to grant the appellant's second prayer in his fourth bill of exceptions, because, if it were conceded that Crandall's stake deposited, consisted wholly of shimplasters, as they are termed, and that nothing could be recovered for them, it requires the Court to instruct the jury, that no recovery could be had on account of \$100 Virginia bank note, deposited by Doebaker.

The rejection of the third prayer of the appellant in his fourth bill of exceptions, requiring the Court to instruct the jury, that if they believed "that the notes staked were of less value than \$200 in gold or silver, or either, the plaintiffs cannot recover," is too obviously correct to require any assignment of reasons to sustain it.

The refusal to grant the appellant's fourth prayer in his fourth bill of exceptions, follows as a corollary from the interpretation given in the commencement of this opinion to the 3d sec. of the Act of 1838, chap. 392.

The fifth prayer in the appellant's fourth bill of exceptions, was, we think, rightly refused by the Court below. It required too much at the hands of the Court. It called on it to instruct the jury, that the appellees could recover nothing if the Virginia bank notes were not at that time redeemable in gold or silver, or were so depreciated, that they would not be received in Baltimore in payment of debts. The failure of a bank to redeem its notes in specie, does not *per se* change the character or destroy the currency of its notes. And there was no evidence from which the Court could submit it to the jury to find, that Virginia bank notes were so depreciated in value as not to be taken in payment of debts in the City of Baltimore,

except it be in payment of debts due to the banks. But, on the contrary, the proof was, that they "passed current from hand to hand in the City of Baltimore, and in purchases up and * down the
495 streets." But suppose they were depreciated to the extent assumed in the prayer. According to the testimony before us, their greatest depreciation was not more than four per cent. below the specie standard, and to the extent of such their value, the appellees were assuredly entitled to recover.

We approve also of the County Court's opinion on the sixth prayer of the appellant's fourth bill of exceptions. Doebaker having deposited his \$100 in bank notes on the wager, it matters not whether Crandall's stake against it was a horse, or any thing else, the bank notes, that is, the money of Doebaker was, under the Act of Assembly, forfeited and payable to the county commissioners, although the horse or other property deposited by Crandall (not being money,) would not be.

The granting of the seven first prayers of the plaintiff in his bill of exceptions, follows as a necessary consequence of the principles which have been adopted in the preceding portion of this opinion.

Were the County Court right in overruling the motion in arrest of judgment, is the only remaining branch of this case which we are required to examine?

Three reasons were assigned in the Court below for arresting the judgment, to wit:

1st. "Because the declaration in this cause does not conclude against the statute in the case made and provided.

2nd. Because the declaration contains no averment that the offence was committed contrary to the statute on which the suit was brought.

3d. Because the declaration contains no averment that the offence was committed contrary to any statute."

The authority mainly relied on by the appellant in support of the reasons assigned for arresting this judgment, is the case of *Lee vs. Clarke*, 2 *East*, 340, in which Lord Ellenborough, in delivering his opinion, says, "but it is contended, that the conclusion here, whereby and by force of the statute, an action hath accrued," &c., and will supply the want of the other allegation," meaning *contra formam statuti*. "If it had said statutes, in the plural number, per-

496 haps that might have done, * but it certainly is not sufficient with reference only to the Stat. 2 Geo. 3, chap. 19, because that alone would not support the action." The plaintiff's right to recover in the case in 2 *East*, rested not on a single but several statutes. In the case before us, the declaration does conclude, "whereby and by force of the statute," &c., and the action being wholly founded on a single statute, the declaration, even upon the principles recognized in 2 *East*, stands exempt from the defect so strenuously urged against it. It is also clearly sustained by the more recent case of the *Attor-*

ney-General vs. Rattenbury, 4 *Eng. Excheq. Rep.* 134, where, in a prosecution for a forfeiture for an offence, created by a particular statute, it was held not to be necessary to charge the acts illegally committed to have been "against the form of the statute," &c., but that it was sufficient to allege the forfeiture to have been "according to the statute," &c., or "by virtue of the statute," &c., fully equivalent to which is the allegation in the present declaration, of "whereby and by force of the statute in such case made and provided, the said sum of two hundred dollars, then and there so deposited, became forfeited and payable," &c. The mode of declaring now complained of, is in strict conformity to a precedent, in 1 *Harr. Ent.* 621, taken from 7 *Went.* 223.

But conceding it was requisite in all the cases referred to, to charge the offence committed as *contra formam statuti*, such an allegation is wholly inappropriate to the case before us. In the authorities adduced, the suits were instituted for the recovery of penalties imposed on the perpetrators of certain acts prohibited by statute. In stating the perpetration of those acts, it might, not without reason, be requisite to state, that they were committed against the form of the statute in such case made and provided. But as respects the acts which create the forfeiture, for the recovery of which the present action is instituted, they are not in terms prohibited by any statute.

All that the Act of Assembly does in relation to the subject is, that it declares every deposit of money in this State, as a wager or bet on elections to be held out of the State of Maryland, shall be forfeited and paid over to the Levy Court or County * Commissioners of the county, for the use of primary schools in said **497** county. We think, therefore, that the declaration complained of, sufficiently indicates to the defendant the Act of Assembly under which it is filed, and that the usual allegation (in suing for penalties,) of *contra formam statuti* is properly omitted.

A ground for arresting the judgment has been relied on in this Court, which does not appear to have been one of the reasons assigned for that purpose in the Court below, and that is, that the Commissioners of Baltimore County are incompetent to sustain this action; that the suit should have been brought in the name of the State. And to sustain this position, *Fleming qui tam vs. Bailey*, 5 *East*, 513, has been cited. The words of the statute on which the action was there instituted, were, "that all pecuniary penalties imposed by this Act, shall, when recovered either by action in any Court, or in a summary way before any justice, be applied, one moiety to the plaintiff in any such action, or the informer before any justice, the other moiety to the King." The statute further provided, that the penalties over £20, each, should be sued for in the name of the informer, but made no provision authorizing the informer to sue in his own name, where the penalties did not exceed £20 each." The

suit was brought by Fleming *qui tam*, for three penalties, each of the sum of £20. The Court held, that the action could not be sustained. Justice Lawrence observing, in reference to the portion recited, that it "only applies to the penalty when recovered, but does not give the informer the original power to sue for it. Thus placing his decision upon the peculiar phraseology of the statute which gave no claim to the penalty until it was recovered, therefore, and such recovery could only be had in the name of the King. Had the statute directed that the penalty, as soon as it was incurred and sued for, should be paid to the informer, the inference is manifest, that in the opinion of the learned Judge, he could have maintained the action in his own name. In the case before us, the language of the Act of Assembly is too clear to admit of a doubt. It declares that the * entire deposit "shall be forfeited and paid over to the Levy Courts or County Commissioners of the County, for the use of primary schools in said County," and their right to sue for it in their corporate name, is a point, we think, too clear for controversy.

Judgment affirmed.

THE MARINE BANK OF BALTIMORE *vs.* THE MERCHANTS BANK OF BALTIMORE.—December, 1842.

Where a cause is submitted upon a case stated, which only authorizes the Court to decide a question, but does not confer authority to enter a judgment, this Court, upon appeal, must reverse the judgment, and remand the cause for further proceedings.

APPEAL from Baltimore County Court. This was an action of assumpsit, brought by the appellant to January Term, 1840, against the appellee, *non assumpsit*.

The case was submitted to the County Court upon a statement of facts, which concluded, as follows:

"The question is submitted to the Court upon the foregoing statement of facts, whether the Marine Bank is entitled to recover from the Merchants Bank, the amount as paid."

The County Court rendered judgment for the defendant. The plaintiff appealed.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

Wallis, for the appellant. *Brown*, for the appellee.

BY THE COURT.

There being no provision in the case stated, as to the judgment to be entered, after the Court's opinion is expressed on the question

submitted, the Court can give no judgment, and the cause must be remanded.

Judgment reversed, and procedendo awarded.

* EDMUND DIDIER vs. WASHINGTON KERR.—December, 499
1842.

The affidavit under the Act of 1795, chap. 56, to authorize the issuing of a warrant to the clerk of the County Court, for an attachment to compel the appearance of an absent or absconding debtor, is insufficient, if purporting to be made by the attorney in fact of the creditor. (a)

APPEAL from Baltimore County Court. This was an attachment, to compel the appearance of the appellee, commenced on the 4th May, 1839. The warrant was founded upon the deposition of "Henry Didier, attorney in fact of Edmund Didier," and was returned levied upon certain real property in the City of Baltimore. The writ against the appellee was returned *non est*. Judgment of condemnation was entered at the same term, when the appellee moved the Court to quash the attachment, because the account on which the order to issue the same was granted, is not verified by the oath of the plaintiff himself, but by a pretended attorney in fact. At January Term, 1841, the County Court struck out the judgment of condemnation, and quashed the writ of attachment. The plaintiff appealed to this Court.

The Act of 1795, chap. 56, sec. 1, provides, that the creditor may make application for an attachment to any Judge, &c., "and on the oath or affirmation of such creditor, made before any, &c., that the said debtor is *bona fide* indebted to him, in the sum, &c., over and above all discounts," &c., the Judge, &c., shall issue a warrant for an attachment, &c.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

R. Johnson, for the appellant. J. Mason Campbell, for the appellee.

BY THE COURT.

Judgment affirmed.

(a) But see Rev. Code, Art. 67, sec. 7.

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ACCOUNT.

See ATTACHMENT, 4.
EQUITY, 39, 40, 41, 81.

ACTION.

1. A party who relies upon a mere contract of indemnity has no right of action until he has been made to pay money. It is by payment he is damnified, and then his cause of action arises. *Hall vs. Creswell*, 26.
2. It is in many instances perfectly consistent to pursue two different remedies, when either may avail, taking care only to obtain the fruits of one. *Lee vs. Boteler*, 223.

See COVENANT, 1.
EQUITY, 58, 59.

APPEAL AND ERROR.

1. Since the Act of 1825, chap. 117, upon an exception, this Court can only look to the point decided. *Burgess vs. State*, 43.
2. When the Court is divided upon a motion to dismiss an appeal, the motion does not prevail. *Hatton vs. Weems*, 57.
3. Under the Act of 1820, chap. 161, a final decree is irregular, and liable to be reversed on appeal, unless before the decree, the commission had lain in Court, one entire term. *Ib.*
4. Since the Act of 1825, chap. 117, (Rev. Code, Art. 71, sec. 7,) on appeal in a case brought up on bills of exceptions, this Court only decides upon the prayers as made below, or the instructions which appear to have been granted. *Gray vs. Crook*, 163.
5. Under the Act of 1826, ch. 200, sec. 6, upon an appeal from the Court of Chancery, the record must be transmitted to this Court within forty days from the entry of the appeal, otherwise the appeal will be dismissed on motion. *Prout vs. Berry*, 195.
6. The clerk of the Court is not authorized to strike out a judgment and reinstate a cause, except by order of the Court, although he may be so directed by Act of Legislature. *Ib.*
7. After an appeal taken from an order of the Court of Chancery, and dismissed by this Court, the cause was again brought to the notice of the Chancellor by petition for further proceedings; it is then in the same situation as if no appeal had been taken. *Lee vs. Pindle*, 197.
8. Where a Justice of the Peace, professing to act under the authority of an Act of Assembly, adjudges a fine to be due, the party sentenced may remove the sentence to the County Court by writ of *certiorari*, and the *certiorari* being there quashed, and the cause

APPEAL AND ERROR.—*Continued.*

remanded, the same party may by writ of error bring the record from the County Court to the Appellate Court, where, if the justice have no jurisdiction, the judgment of the County Court will be reversed, and the proceedings quashed. *Hall vs. State*, 226.

9. Pending a *caveat* to a nuncupative will appointing an executor, the Orphans' Court granted letters of administration *pendente lite*. After this, the *caveat* was overruled, and the will established by the Orphans' Court. The caveators appealed. This suspends all further proceedings before the Orphans' Court, and while it is undecided, that Court cannot proceed to grant letters of administration. *Ofutt vs. Gott*, 268.
10. Appeals from the Orphans' Court are heard and determined at the term to which the appeal is taken. *Ib.*
11. The Act of 1798, ch. 101, sub-ch. 2, sec. 9, gives the Orphans' Court jurisdiction to decide a *caveat* to a will or codicil respecting personal property, or appointing an executor; the 11th section authorizes either party, aggrieved by its decision in such cases, to appeal, declares, that such appeal shall stay further proceedings, and that the decree of the Court appealed to, shall be final and conclusive; and the 19th section of the 15th sub-chap. of that Act, does not warrant the granting letters of administration in chief, pending an appeal from a decree overruling a *caveat* to a will. *Ib.*
12. Where the plaintiff, in an action to recover a forfeiture, erroneously deemed it essential to give notice to the defendant not to part with the thing forfeited, evidence for that purpose improperly admitted by the County Court, is not such an error as will induce this Court to reverse the judgment upon appeal. It did the appellant no injury. *Doyle vs. Comm'rs of Balto. Co.* 332.
13. Where the Court cannot grant the entire prayer as made, though a portion of it in a separate, distinct form, might have been given, it is not error to reject the whole. *Ib.*
14. Where a cause is submitted upon a case stated, which only authorizes the Court to decide a question, but does not confer authority to enter a judgment, this Court, upon appeal, must reverse the judgment, and remand the cause for further proceedings. *Marine Bank vs. Merchants Bank*, 342.

See ARBITRATION AND AWARD, 1, 8.

ATTACHMENT, 10.

EQUITY, 16, 17, 26, 36, 42, 75.

ARBITRATION AND AWARD.

1. An appeal will lie from the judgment of the County Court setting aside an award. *State vs. Stewart*, 311.
2. Where a cause had been referred to arbitrators, with power to decide all matters in controversy between the plaintiff and defendant, and the arbitrators had returned an award, subject to no exception upon the face of it, upon a motion to set the award aside, the Court will not receive parol proof to control or alter the terms of the submission, nor the depositions of the arbitrators to show the character of the items of which the award was composed, or that they had decided upon a matter before the reference finally adjudicated, and so not within the submission. *Ib.*

ARBITRATION AND AWARD.—*Continued.*

3. Where the County Court set aside an award, and their decision upon appeal is reversed, there being no objection to the award on its face, nor any thing in the record to impeach it, this Court will enter judgment in conformity to it. *Ib.*

ASSIGNMENT.

See EQUITY, 10.

EVIDENCE, 3.

ATTACHMENT.

1. By the Act of 1795, chap. 56, sec. 1, (Rev. Code, Art. 87, IV, sec. 4.) an attaching creditor, at the time of making the preliminary proof of his claim, in order to procure a warrant for an attachment, is required to produce "the bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument of writing, account or accounts by which the said debtor is so indebted." *Held*—It was not intended that the creditor should be bound to produce before the Judge or justice, all the written evidence which may be in his possession, and which might be used before a jury to establish the debt, and entitle him to a condemnation of the property attached. *Dawson vs. Brown*, 34.
2. In an action against an endorser, it would be sufficient to produce the note endorsed by him. *Ib.*
3. So in an action upon an agreement containing dependent covenants, the production of the agreement would suffice. *Ib.*
4. So for the recovery of an open account, or for matters and things properly chargeable in account, though the creditor has written orders for each item, he need not produce them, nor more than his account, to the justice. *Ib.*
5. The Act does not require the production of the testimony *qua* testimony, but of the cause of action. The account, bill, bond, &c. on which a declaration would be framed, and by which the debtor is so indebted. *Ib.*
6. The creditor in making his preliminary proof for the notes of his debtor, is bound to produce them; but where his claim arises upon the draft of his debtor on him, paid, the drafts are but testimony and need not be produced at that time. *Ib.*
7. Where the affidavit and account filed by the creditor warrant an attachment for a sum of money, but not for the whole amount claimed, it is irregular in the justice to award the attachment for a greater sum than is properly established under the Act of 1795; but it is not such an error, the case is not so entirely *coram non judice*, as to authorize the County Court, upon the appearance of the garnishee, to quash the attachment. *Ib.*
8. Where it was held that a substantial compliance with the Act of November, 1795, chap. 56, sec. 2, directing the manner of suing out attachments against absent debtors, was sufficient. *Washington vs. Hodgskin*, 248.
9. In determining the sufficiency of the Governor's certificate in such cases, it will be construed in connexion with the affidavit to which it is appended, with a view to show that the particular facts de-

ATTACHMENT.—*Continued.*

manded by the Act of 1795, really exist in the case made by the documentary proof. *Ib.*

10. The appeal in this case was properly taken from the judgment quashing the attachment, and not from the refusal of the Court to strike out the judgment. *Ib.*
11. The affidavit under the Act of 1795, chap. 56, to authorize the issuing of a warrant to the clerk of the County Court, for an attachment to compel the appearance of an absent or absconding debtor, is insufficient, if purporting to be made by the attorney in fact of the creditor. *Didier vs. Kerr*, 848.

BANK.

See TAXATION, 2, 3, 4, 6, 7.

BANKRUPTCY AND INSOLVENCY.

See DEED.

EVIDENCE, 4.

LIEN.

SCIRE FACIAS, 2.

BOND.

See EQUITY, 55, 57.

EVIDENCE, 3.

LIEN.

LIMITATIONS, 3.

COMMISSIONERS.

Commissioners appointed by law—invested with a public trust—with means for its execution—with full power to act—must be entitled to use all the appropriate means necessary to the end in contemplation, and are regarded as having such an interest in the subject confided to them, as will enable them to proceed before the tribunals of the country, for the due protection of the rights entrusted to them. *Lucas vs. McBlair*, 1.

CONSTITUTIONAL LAW.

1. The proviso in the 5th section of the Act of 1835, chap. 395, "that if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland, for the use of Washington County," though assented to by the Company, does not constitute a case of contract, but a case of penalty, subject as to its enforcement to the will and pleasure of the Legislature. *State vs. B. & O. R. R. Co.* 279.
2. Where by Act of Assembly a penalty or forfeiture is created for the benefit of a particular county of the State, it is competent for the Legislature to release or remit it after the forfeiture has occurred. *Ib.*
3. Such a releasing Act is not an *ex post facto* law, nor a law impairing the obligation of contract. *Ib.*
4. No penalty incurred during the continuance of a law can be enforced after its expiration or repeal, without a saving clause or special provision to that effect. *Ib.*

CONSTITUTIONAL LAW.—*Continued.*

5. A contract made by the State, for the use and benefit of one of its counties, is not within the purview of that part of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contract, so far as to prevent the Legislature from releasing it at pleasure, or discontinuing an action brought for its enforcement in the name of the State. *Ib.*
6. To declare an Act of a co-ordinate department of the Government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional provision, is an exercise of the judicial office of a grave and delicate nature, which never can be warranted but in a clear case. *Ib.*

CONTRACT.

Where the language of a contract is equivocal and ambiguous, regard is always to be had to the subject-matter about which the parties are stipulating, and such a construction of the terms used is to be adopted, as will carry their intention fully into effect; but where a party expressly contracts as security, he is not to be treated as principal. *Slater vs. Magraw*, 188.

See CONSTITUTIONAL LAW, 1, 3, 5.

CORPORATION.

An Act or charter of incorporation is nothing more than an offer until consummated by acceptance. *State vs. B. & O. R. R. Co.* 279.

COSTS.

See EQUITY, 29, 48, 49.

COUNTY.

1. A county is an integral part of the State, or portion of the body politic, and money received by her, would belong to her as public property, in her public political capacity, to be applied exclusively to the public use. *State vs. B. & O. R. R. Co.* 279.
2. A county, as a member of the political family, has a right to participate in the legislative council of the State, but the will of the majority, when expressed according to the forms of the Constitution, is obligatory upon her, and to that will, as the rule of her conduct, she is bound to submit with becoming deference and respect. *Ib.*
3. A county is one of the public territorial divisions of the State, established for public political purposes, connected with the administration of the government—the money it receives in that character is public property, to be used for public purposes only, and not for the use of its citizens individually. In that relation they would have no immediate interest, and could assert no title. *Ib.*

COURT.

See EQUITY, 20, 21.

COVENANT.

1. The rule is well settled, that where the interest of the parties is several, and the language of the covenant is joint, the right of action founded upon it is several. Where the interest is joint, the action must be joint, though the covenant in terms appears to be joint and several. *Slater vs. Magraw*, 188.

COVENANT.—Continued.

3. The breach assigned in covenant should be within the terms or the legal effect of the instrument declared on. *Ib.*
3. Where M. gave his receipt under seal for the purchase money of a slave for a term of years, sold by him: and in the same instrument stipulated to give a good title when called on; and D. also sealed the same paper, prefixing the word "security" to his name. This was held not to be the joint covenant of both, nor the joint and several covenant of each to convey a good title. That M. was the principal, and D. the surety; the title was to be conveyed by M. and not by D. who had no title. *Ib.*
4. Neither was this a joint covenant that M. should convey, nor a covenant to deliver the negro. *Ib.*
5. The covenant in this case to convey the title was the covenant of M. alone; and the covenant of D. a several one in the character of security, that M. should make the title when called on for that purpose. *Ib.*

CRIMINAL LAW.

1. Where the enacting clause of a penal Act contains an exception, it is not indispensable that an indictment framed under it should set forth an express negation of it. *State vs. Price*, 180.
2. Where the charge preferred *ex natura rei*, as conclusively imports a negation of the exception, as if such negative had been in express terms, no rule of construction requires more. *Ib.*
3. Where exceptions are in the enacting part of a law, it must appear in the charge, that the defendant does not fall within any of them. A case must be averred which brings the defendant within the Act. That a faro table is not a billiard table, is a fact of such notoriety as to be within the knowledge of the community at large; and hence there is no presumption of law or fact which will prevent the Court from judicially knowing what a faro table is. *Ib.*
4. If a billiard table, which is excepted from the penalties of the Act, were in fact used as a faro table, *ipso facto*, it would lose the immunity conferred upon it. *Ib.*

DAMAGES.

See *WAGER*, 5.

DEBTOR AND CREDITOR.

1. It does not necessarily follow that one who advances money for a debtor to pay his creditor, and in fact pays the money to the creditor for the debtor, is either a purchaser of the debt or a mere volunteer. Upon the fact appearing, that the debtor had agreed to execute a mortgage for his security, and that the judgments against him should be assigned by way of security to the party making the advance, he would be considered as an agent in making the payment. *Hall vs. Creswell*, 26.
2. A mere volunteer, without any authority, undertaking to discharge a debt, does not succeed to the rights of the party whose debt he so discharges. *Ib.*

See *LIMITATIONS*, 1, 3.

DEED.

The deed of an insolvent debtor conveying his property to a trustee for the benefit of creditors under the usual order of Court, acknow-

DEED.—Continued.

ledged before the clerk of the County Court, is not properly acknowledged. *Mackall vs. Farmers Bank*, 119.

DOWER.

Where a widow's right to dower is admitted, she is, before its assignment, entitled to an account of the rents and profits of the land, and one-third of the net amount thereof, as her proportion. *Darnall vs. Hill*, 270.

See EQUITY, 70, 71, 73, 74.

EJECTMENT.

1. In an action of ejectment against the defendant in a judgment, whose land had been levied upon and sold to pay his debt, by the purchaser thereof, he is not called upon to show title out of the State. All that is required on the part of the plaintiff, is the production of the judgment against the defendant, the *feri facias*, and proof of the sale of the land to the plaintiff. *Miles vs. Knott*, 800.
2. A verdict in ejectment which calls to run from one fixed object to another, with the meanders of a stream, not located upon the plots, is so entirely uncertain, whether it is within the lines of the tract claimed and defended or not, that no judgment could be entered upon it, nor writ of possession executed under it. It may therefore be set aside upon a motion in arrest, and a *venue de novo* awarded. *Ib.*

See JUDGMENT, 1.

EQUITY.

1. By the Act of 1838, c. 323, commissioners were appointed by name to build a Town Hall in Baltimore, and with power, by a scheme or schemes of lotteries and sales thereof, or tickets therein, to raise the sum of, &c. To restrain interference with their sales, these Town Hall commissioners filed a bill praying for an injunction against the Commissioners of Lotteries, and persons licensed by them, in relation to the approval of tickets in the lotteries for this State and other States, and sales of tickets therein and granting licenses therefor. Upon this it was *held*—
 - (1.) That considering the difficulty of obtaining adequate redress at law, and the probability that a multitude of suits would necessarily be instituted to protect the complainant's franchise, the process of injunction was a proper remedy.
 - (2.) That as trustees, invested by law with an important public duty, they were competent, as parties complainants, to proceed in equity in their own names, to protect the franchise committed to them from violation. *Lucas vs. McBlair*, 1.
2. The State was not necessary party to the bill in order to obtain an injunction. *Ib.*
3. The difficulty of obtaining adequate redress in a Court of law is one of the well established grounds for resorting to a Court of Chancery, and especially where in the pursuit of justice it may be necessary to resort to a multiplicity of actions at law. *Ib.*
4. A statute privilege, in possession, of an exclusive character, not admitting of an injurious competition, may in its use and enjoyment be protected by injunction, equally essential in such cases to prevent

EQUITY.—*Continued.*

- ruinous litigation, as fraud and evasion of the right. A franchise to propose a scheme of a lottery and sell tickets for a particular object, is so far of an exclusive nature, as to be within the principle above stated. *Ib.*
5. The Act of 1828, chap. 129, sec. 21, recognizes the propriety of a resort to the writ of injunction in such cases. To prevent irreparable injury or multiplicity of suits, are grounds for obtaining an injunction. This preventive remedy is now granted more liberally than formerly. *Ib.*
 6. It is not necessary in all cases, that the *cestui que trusts* or parties beneficially interested, should be parties to a bill in equity. *Ib.*
 7. The want of a party as a defendant, is generally no ground upon which to claim a dissolution of an injunction; a necessary party may be supplied before final hearing. *Ib.*
 8. It is the constant aim of Courts of equity to do complete justice, by deciding upon and settling the rights of all parties interested in the subject-matter of the suit, but this may be obtained by having the necessary parties before the Court at any time before the final decree is passed. *Ib.*
 9. If all parties interested are not made parties to the suit, the Court many times, upon hearing, will not for want of them proceed to a decree. *Ib.*
 10. The holder of a bond of conveyance for a parcel of land, as assignee, made and delivered a deed, by which he conveyed to G. the land described in the bond; afterwards, to defeat G. and with a fraudulent intent to deprive his conveyance of its intended operation, he re-delivered the bond to the original obligee, when the assignment was erased and a new assignment endorsed to C. by the obligee. *Held*—That under such circumstances, neither the first assignee, nor C. who in fact claimed under him, could seek in equity a specific execution of the contract as against the obligor, or defeat G's title. *Clary vs. Grimes*, 23.
 11. A defendant in resisting the claim of a complainant, is entitled to see that the Court keep within its established rules in determining the rights of the latter, although the defendant's conduct may have been harsh. *Ib.*
 12. The language of the Act of 1795, chap. 88, discriminates between a proceeding before, and after, a decree, against a non-resident defendant. *Lockett vs. Jay*, 46.
 13. Before the decree has passed, the language authorizing the action of the Court is broad and comprehensive. It is, there shall in all respects be the same proceedings before a decree, as if the defendant had appeared regularly on the return of a subpoena. *Ib.*
 14. After the decree has passed, the language is more restricted, and clearly warrant nothing more than a review of the decree itself, according to the established principles of equity, and as if the party had appeared. *Ib.*
 15. A bill of review is the appropriate remedy to correct or alter a decree either for error apparent, or by reason of the discovery of new and relevant matter after the decree has passed. An original bill is

EQUITY.—*Continued.*

- never proper to be resorted to, except where the decree is to be impeached on the ground of fraud. *Ib.*
16. After a decree has been affirmed upon appeal, no bill of review would properly lie for error apparent on the face of the decree. The exercise of such a jurisdiction by the Court of Chancery would be subversive of that subordination which has been established by the Constitution of the State. *Ib.*
 17. A bill of review which would lie in such a case, must be founded upon new matter discovered since the decree, and in that sense the opinion of the Court in 10 G. & J. 497. is to be understood. *Ib.*
 18. Upon a bill sworn to before a Justice of the Peace in the District of Columbia, who was certified to be such Justice by the Secretary of State for the United States, under his seal of office, the Chancellor granted an injunction. *Ib.*
 19. It is the practice of the Court of Chancery when the defendant appears and answers, and the case brought to an issue, the commission, after its return, lies one whole term before the cause is ready for a final decree. *Hatton vs. Weems*, 57.
 20. The terms of the Court commence and terminate on certain days; and a term comprises the whole intermediate period. *Ib.*
 21. At each term of the Court of Chancery there is a specified period denominated its sittings; as at December Term, the sittings commence with the commencement of the term, and end on the third Tuesday of January next ensuing; a cause ripe for decree may be called up and argued or submitted at any time during the sittings, but not after the sittings are over except by consent. *Ib.*
 22. Where the rule security for costs is entered on the docket irregularly, the Chancellor cannot be called upon to enforce it. *Ib.*
 23. Where the non-residence of the complainant appears on the face of the bill, the rule security for costs may be laid on the docket during the sitting of the Court. *Ib.*
 24. Where the non-residence of the complainant does not appear on the bill, the question of security for costs must be brought before the Court by petition, and a special order obtained. *Ib.*
 25. A defendant in default for not appearing and answering a bill, while in default, cannot lay the rule security for costs. *Ib.*
 26. A prayer of appeal is a waiver of the right to demand security for costs. *Ib.*
 27. Any proceeding in a cause recognizing the complainant's right to sue, takes away the defendant's right to have security for costs. *Ib.*
 28. When the right to ask security for costs is once waived or abandoned, the filing of a supplemental bill of revivor by an administrator, does not revive that right. *Ib.*
 29. Where the Court has to modify and reform a decree, and each party has to some extent succeeded, each party should pay their own costs in this Court. *Ib.*
 30. A bill in the County Court, seeking its interposition upon the same grounds previously decreed upon in the Court of Chancery, at the suit of the same complainant, without communicating the proceedings which had taken place in Chancery, is a contempt offered to

EQUITY.—*Continued.*

- the County Court, and an abuse of its privileges, which merit, and might be visited with, severe reprehension. *Penn vs. Brewer*, 79.
31. A trustee appointed by the Court of Chancery, is an officer of that Court acting under its direction and authority; and so far as concerns matters of equitable jurisdiction, as to what he does, or ought to do, in discharge of his duties, is alone responsible to that Court. *Ib.*
 32. Where, upon a bill filed to vacate certain patents upon the ground of combination and fraud, it was *held*, there was no proof of fraud. *Steyer vs. Hoyer*, 188.
 33. If the answer swears away or denies the equity stated in the bill, the injunction granted on the bill will be dissolved: but if the equity be admitted or is not denied, or if new matter is set up in the answer by way of avoidance of any material allegation in the bill, the injunction will be continued until the final hearing or further order. *Hutchins vs. Hope*, 168.
 34. An answer alone will not support a distinct fact set up in it by way of avoidance, and upon the motion to dissolve an injunction is not considered as established. Such a defence must be made out by proof. *Ib.*
 35. The plea of limitations in an answer is not a sufficient ground for a dissolution of an injunction on motion. *Ib.*
 36. Upon an appeal from the continuing of an injunction, the order being affirmed, the cause is remanded for further proceedings. *Ib.*
 37. Where a case was submitted by agreement, as upon bill, answer and general replication, though no general replication be in fact filed, yet it should be heard and decided according to the terms of the agreement. The answer is considered as replied to. *Glenn vs. Hobb*, 186.
 38. When a cause is set down for hearing after the general replication is in, the facts set out in the answer as a defence, are denied. *Ib.*
 39. Where a partnership is stated in a bill, and confessed by the answer, the general rule is, that an account is of course, unless the party has slept upon his rights. *Ib.*
 40. Lapse of time may bar the right to demand an account. *Ib.*
 41. A partnership was dissolved by the death of one partner in 1825; from 1821 to that period, the other partner had been entrusted to wind up the concern, at an annual salary, but no administration was taken out upon the deceased partner's estate until 1832, and the bill was filed in 1837. Under such circumstances, lapse of time is not a bar to a bill filed for an account by the administrator of the deceased partner. *Ib.*
 42. Since the Act of 1830, chap. 185, an order of the Court of Chancery, which is not a final decree, nor in the nature of a final decree, does not authorize an appeal. *Clagett vs. Crawford*, 190.
 43. A preparatory order directing the auditor to state an account, with a view to a future decree, and containing various opinions and directions according to the then existing views of the Chancellor, for the guidance of the auditor, is not an adjudication of any right between parties. *Ib.*

EQUITY.—*Continued.*

44. Under such an order, although the auditor may report in strict compliance with the Chancellor's expressed views, still he may overrule the account, order another upon different principles, or even dismiss the proceedings if justice requires it. *Ib.*
45. The principle is settled, that Chancery will not, on further directions, decide a question, not reserved by the original decree. *Lee vs. Pindle, 197.*
46. But in a decree for the sale of negroes, to warrant the Court in granting full and complete relief for their hire and annual value, as prayed by the bill, it is not necessary to reserve any equity for further directions as to those subjects. *Ib.*
47. Neither does this general rule prevent the Court from giving interest on further directions, though the question of interest was not reserved by the decree. *Ib.*
48. Costs in Chancery are in the discretion of the Court. *Ib.*
49. Where an executor interposes no improper obstacles to the ascertainment of the right to property, found in the possession of his testator, the costs are properly chargeable on the fund; but if, in the progress of a cause, he changes his conduct, and offers untenable and vexatious grounds of defence, equity may award costs against him upon the final decree. *Ib.*
50. Under the bill in this cause, the distributive share of each legatee should have been liquidated and finally settled by the decree, so as to prevent all future controversy and litigation upon the subject; and it was error to stop the account for hires and profits at a period anterior to the sale, reserving directions for a further account from such period to the day of sale, when that should in fact take place. *Ib.*
51. A bill which sets out the previous proceedings of the Court as a portion of the facts out of which the complainants' equity arises, though alleged to be on its face a supplemental bill, yet did not seek to alter or amend any decree or order passed in this cause, is neither a supplemental bill nor a bill in the nature of a bill of review, but is an original bill. *Brooks vs. Brooke, 209.*
52. The general rule is, that a Court of Chancery has no power over the securities of a trustee of the Court, but this has some exceptions. *Ib.*
53. Where property is sold under a decree of a Court of equity, the proceeds of sale are considered in the custody of the Court, and no person, whether a party to the bill or otherwise, can maintain a suit at law for the recovery of any portion thereof, until the payment of a claim, thus prosecuted, shall have been awarded by the Court, and notice of such award, and a demand of payment, shall have been made of the trustee or other officer in whose hands the funds may have remained as the fiduciary agent of the Court. *Ib.*
54. But where the trustee is delinquent, and having wasted the fund dies intestate, without any administrator, or estate on which administration could be had, and a claimant could not place himself in a situation to proceed at law, by obtaining a previous award against the trustee, accompanied with notice and demand of payment, then equity will afford relief against the securities. *Ib.*

EQUITY.—*Continued.*

55. Evidence by an under clerk employed in the office of a clerk of the County Court, that he had made a careful examination for a trustee's bond, of all the papers connected with the cause in which the bond had been given, and of all the other equity cases in the office since for the original bond, and could not find it, and did not know where it was to be found, and that every bundle of papers in the office, and every part of the office, where he thought there was a possibility of finding it, he had also examined, and that he verily believes it to be lost, with proof that the bond once existed, is sufficient proof of its loss to warrant the interposition of a Court of equity as far as that fact would give it jurisdiction, but the loss of the bond was not material in this cause. *Ib.*
56. Where mortgaged premises are decreed to be sold, prior incumbrancers not parties to the bill, nor before the Court, are not bound to seek payment of their claims out of the proceeds of sale in the hands of the trustee to make the sale, and if not paid off, may prosecute their liens upon the lands sold, after the conveyance to the purchaser, notwithstanding he had paid the whole purchase money, and the land had been sold to him by the trustee free from all incumbrances. *Ib.*
57. Where a trustee for the sale of mortgaged property sells the same free of incumbrances, wastes a portion of the purchase money, and dies in default, without having complied with an order of the Court directing him to pay off the prior incumbrances, and a second trustee is then appointed, the Court may order him, with the funds that come to hand, to discharge these prior incumbrances, in order to protect the purchaser, though the first trustee had received funds sufficient for their payment. Those who lose claims by this application of the funds, could sue at law on the bond of the first trustee, to the extent of the funds wasted, and if, by accident, they are remediless at law, equity will give them relief against the sureties on such bond. *Ib.*
58. Where a judgment became a lien on the equity of redemption of the defendant, in land previously mortgaged by him, and afterwards on a bill filed by the mortgagee against the mortgagor, the land was sold and the trustee ordered to pay off, first prior incumbrancers, not parties to the proceeding, then the mortgagee, and then, by an informal order, the above mentioned judgment; and the trustee wasted a portion of the purchase money received by him, and a second trustee was appointed who was directed to apply other funds to the payment of the prior incumbrances, whereby the said judgment failed to be satisfied, and the superseder of that judgment was compelled to pay it, and not having a remedy at law against the sureties of the delinquent trustee, by reason of the death of the trustee without administration on his estate, and before the judgment creditor had obtained an order awarding him the sum due on the judgment, and the superseder filed his bill in equity against the sureties of the delinquent trustee, *held*, that the said sureties cannot defend themselves on the ground that the money paid by the second trustee to the prior incumbrancers should have been paid in satisfaction of the judgment: because, conceding that were so, the judg-

EQUITY.—*Continued.*

- ment creditor would be subrogated to the rights of the prior incumbrancers, and would have a remedy by substitution against the sureties of the first trustee, to the extent of the misapplied funds. *Ib.*
59. By a decree under which a sale was made, the trustee was ordered to report the sale and to bring the proceeds of sale into Court; disobedience to the latter branch of this decree is a breach of the condition of his bond, for which he and his securities may be sued at law by any person who can show himself damnified, and clothed with the requisite authority to sue. *Ib.*
60. A Court of equity will do nothing to extend the liability of securities beyond the clear intent and import of their contract; but if to such an extent they cannot be held liable at law, by reason of fraud, accident or mistake, equity will, to prevent a failure of justice, interfere, and enforce the execution of their contract according to its obvious meaning and design. *Ib.*
61. Chancery jurisdiction was originally assumed upon the great principle, that without it there would be a total failure of justice, a Court of law being incompetent to grant adequate relief. *Ib.*
62. Where an audit is confirmed by a Court of equity, the approved practice is also to pass an order to pay the claims which were thereby allowed; but the judgment of the Court is effectually pronounced on a claim by confirming the auditor's report, if no steps are taken to revoke or overrule it. *Lee vs. Boteler*, 223.
63. B. and G. as executor and executrix of the deceased husband of G. were sued at law upon a claim passed by the Orphans' Court. B. confessed judgment in 1885. G. also confessed judgment in 1886, ignorant of any defence to the action. In 1887, when she had been informed by her co-executor, after it was too late to move for a new trial, that no receipt could be found, she discovered a receipt for the money claimed of her, given nine years before the action at law was instituted. Upon a bill filed to obtain relief, the fact of the receipt being admitted by the answer, and no proof taken to avoid it: *Held*, that the judgments against both executors should be stricken out, and the action brought forward by regular continuances for trial. *Gardiner vs. Hardey*, 253.
64. Where a witness is excepted to in the Court of Chancery, as incompetent, on the ground of interest—as being a defendant to the bill, and as the legal plaintiff in an action at law sought to be enjoined, the Court will consider the admissibility of the witness under the circumstances, and not the sufficiency of the objections assigned. *Ib.*
65. Where a defendant answers the interrogative part of a bill, fully and distinctly, as put to him, and then proceeds to allege a variety of facts, not enquired of the bill, nor of which he had been interrogated, to do away the effect of his previous answer, such facts constitute matters of avoidance. *Ib.*
66. Facts in an answer not responsive to the bill, nor sustained by proof, at the final hearing of the cause are entitled to no consideration. *Ib.*

EQUITY.—*Continued.*

67. When a defendant, executrix, at law had confessed judgment, and sought to set it aside in equity, for the purpose of obtaining a new trial, on the ground of subsequent discovery of a receipt for the money claimed, the denial on oath of all previous knowledge of the existence of the receipt, and statement of the time and manner of its discovery by the complainant in her bill for relief, she being the custodiary of the papers of her testator, must, in the absence of all proof impeaching its verity, be received by the Court as evidence, and weighed in connexion with the other facts in the cause. *Ib.*
68. R. died in 1816, leaving a widow and minor children. In the following year the widow married D. who, with his wife and her children went into possession of the estate of R. In 1820, D. was appointed guardian of the children; he remained in possession, cultivating and using the lands and negroes, &c. until 1832, receiving and selling the crops, and using their proceeds, when he delivered up the estate to the children, declaring he should not claim anything for his wife's thirds of her first husband's estate. Upon a bill filed in 1833, by D. and wife, against the heirs of R. claiming her third of the rents and profits of the estate, her right to dower being admitted, it appeared that D. had delivered the crop of 1831, to W. one of the children. *Held*, that if D. had any claim for a proportion of the crops of 1831, it was against W. at law, and that he could not recover against the other defendants, prior to filing his bill in 1833, and that, under the circumstances the complainants were not entitled to interest on their portion of the rents and profits, when ascertained. *Darnall vs. Hill*, 270.
69. It is against equity to permit a party to take advantage of a course of conduct, pursued by another in consequence of the declared intentions of the claimant, made with full knowledge of his rights. *Ib.*
70. In a bill for a widow's proportion of rents and profits in lieu of dower, her right being admitted, no allegation of a demand for an assignment of dower is necessary. The heir in possession is answerable for damages from the death of the husband, even without demand, unless she plead *tout temp prist*; and even then, he is liable from the date of the subpoena against him. *Ib.*
71. Upon a bill by husband and wife, claiming a portion of rents and profits, as damages for the detention of her dower or in lieu of dower, the defendants, the heirs of the first husband, cannot set off a demand which they may have against the second husband, for the use and occupation of the land during their minority. The two claims are not due in the same right; and that for damages would survive to the wife. *Ib.*
72. Where the proof shews that the defendants were in possession of land, as heirs-at-law, the legal presumption would be, that such possession continued until the contrary was shown. *Ib.*
73. According to the practice of the Court, an account charging rents and profits may be brought down to the date of the decree in this Court, or the Court of Chancery, or to the time of the delivery of possession of the dower assigned to a widow. *Ib.*

EQUITY.—*Continued.*

74. On the 2nd October, 1838, the complainants filed a bill claiming an account of rents and profits, and a proportion thereof as due one of them for dower in her deceased husband's estate. On the 3rd of the same month, the same complainants filed another bill against the same defendants, claiming an assignment of dower, and an account and proportion of rents and profits up to her assignment. Upon the latter bill a commission to assign dower was issued, executed, returned, and finally ratified in 1838; but the decree took no order, and passed no judgment upon the subject of anterior rents and profits. *Held*, that the proceedings and decree under the second bill was no bar to a recovery under the first. *Ib.*
75. Under the Act of 1832, chap. 302, sec. 6, this Court will notice judicial proceedings embodied in the record, not excepted to, neither pleaded in bar, nor offered in evidence, but which may materially affect the state of the accounts between the parties, so far as to remand the cause with instructions for further proceedings. *Ib.*
76. Where two bills are depending in the same Court, between the same parties, upon the same subjects-matter, at the same time, and various steps are taken by consent in both, the Court under circumstances will infer, that it was the intention of parties to litigate one portion of their claim under one bill, and another part under the other, and not treat a decree, under the bill which covered the whole ground, as a technical bar to the other. *Ib.*
77. By the well established practice of the Court of Chancery, no cause is ready for hearing, until the commission under which testimony has been taken, has been returned to the Chancery office, and there remained for the period of one entire term. *Richardson vs. Stillinger*, 326.
78. By the rules of Baltimore County Court, the commission and testimony must remain in Court for the period of twenty days before the case is ready for hearing. *Ib.*
79. Where a commission was sued out on the 14th; returned on the 17th; removed to the Court of Chancery from B. County Court on the 22nd, and a decree passed on the 24th of the same month, the decree was prematurely passed under the Act of 1820, chap. 161. *Ib.*
80. The general rule is, that a Court of equity is not to be resorted to for redress where full and complete remedy may be obtained at law. *Ib.*
81. There are some subjects over which Courts of law and equity exercise concurrent power; such as fraud and matters of account. *Ib.*
82. Where plain, adequate and complete remedy may be had at law, a Court of equity ought not to be resorted to. *Ib.*
83. If the personal estate of a deceased vendee is sufficient to discharge the vendor's equitable lien for a balance of unpaid purchase money, due for land sold, the real estate ought not to be sold for that purpose. *Ib.*
84. A bill in equity can be filed to enforce the vendor's lien, only when the complainant has exhausted his remedy at law, or where he avers such facts as will show, that he cannot have a full, complete and adequate remedy at law. *Ib.*

EQUITY.—*Continued.*

85. In requiring a vendor to exhaust his legal remedies, or show that he has none before proceeding in equity to enforce his equitable lien for the unpaid balance of the purchase money, he is not required to proceed by ejectment to re-possess himself of the land sold; nor by way of attachment or *feri facias* to seize and sell the land sold by him in the hands of the vendee. *Ib.*
 86. A Court of equity never requires a complainant to do a nugatory act, nor an act which may impair his equitable rights. *Ib.*
 87. A sale by a vendor of the land sold to his vendee by execution, would be subject to all judgments, liens and outstanding equities, existing anterior to the date of the judgment against such vendee, and upon which the execution issued. *Ib.*
- See EXECUTORS AND ADMINISTRATORS, 2.
 HUSBAND AND WIFE, 5.
 LAND OFFICE, 3.
 LIMITATIONS, 1, 2, 4, 5.
 LOTTERY, 5.
 TRUSTS AND TRUSTEES, 5.

EVIDENCE.

1. The evidence taken under an *ex parte* commission, is not admissible against a defendant, who is brought into the cause by an amendment made in the plaintiff's bill, after the commission had issued. *Clary vs. Grimes*, 23.
2. The declarations of the assignee of a bond of conveyance, made while it was in his possession, and while he was the holder thereof, are evidence against a subsequent assignee of the same bond, who claimed title under the person who made such declarations. *Ib.*
3. In an action brought upon an administration bond, for the use of S. who claimed as the assignee of the obligee of the intestate, it is necessary to prove the assignment of the bond to the equitable plaintiff, but an objection to the admissibility of the bond in evidence, does not raise any question about its assignment; for the bond may be proved as a part of the chain of evidence without proof of the assignment, and if no such proof was eventually offered, the proper objection would be to the plaintiff's right to recover. *Burgess vs. State*, 13.
4. Where a judgment is confessed and accepted subject to the defendant's discharge under the insolvent laws, it is not such an admission of his final discharge, as to constitute sufficient evidence of the affirmative of an issue upon the plea of *nul tiel record* of a discharge, joined in a *scire facias* to revive the judgment. *Mackall vs. Farmers Bank*, 119.
5. The copy of an account of the defendant, passed against a deceased person, certified by the register of wills, under his seal of office, is not evidence against him to establish the facts set out upon the face of such account. The law does not authorize such vouchers to be recorded, nor are they left in the custody of the register. *Miles vs. Knott*, 300.
6. Declarations to affect a sale made by a deputy sheriff, on the ground that they are a part of *res gestæ*, must appear to have been made at the time of the sale. *Ib.*

EVIDENCE.—*Continued.*

7. Declarations of a deputy sheriff, at the time he made a sale of land under a *fi. fa.* are inadmissible in an action of ejectment for the land, to contradict the return of the sheriff, and thus show that a tract returned as sold by one name, was in fact sold by another name. *Ib.*
- See ARBITRATION AND AWARD, 2.
- EQUITY, 55, 64, 67, 72.
- EXECUTION, 2.
- HUSBAND AND WIFE, 4.
- SURETY, 3.
- TRUSTS AND TRUSTEES, 5.

EXECUTION.

1. A levy upon "part of a tract of land called P. containing, &c. more or less, which is now in the possession of D." upon a *feri facias* against D. is sufficient to identify the property. *Murphy vs. Cord*, 123.
 2. The misrecital in the writ of *feri facias* of the judgment, on which it is founded, does not render it inadmissible as evidence for the party who purchased under it. *Miles vs. Knott*, 300.
 3. The failure to recite the judgment accurately in the writ of *fi. fa.* does not render the process void. *Ib.*
 4. It is erroneous process, but such an error does not affect the title of a purchaser acquired under it. *Ib.*
 5. The Act of 1778, chap. 21, sec. 7, gives plaintiffs a year after a stay entered on the docket to issue execution. *Ib.*
 6. The Act of 1823, chap. 194, gives three years from the date of the judgment, and not from the expiration of the stay, to issue execution.
 7. If there be no stay on a judgment, or a stay not exceeding two years, execution must be taken out within three years from the date of the judgment. If the stay be for three years, or a longer period than three years, the execution may be taken out within a year from the expiration of such stay, according to the Act of 1778, chap. 21.
 8. So far as the right to issue execution is concerned, the judgment of supersedeas dates from the day of its confession, and not from the day of its being filed. *Ib.*
 9. No execution can rightfully issue on a supersedeas judgment after three years from its date, without a *scire facias* to revive it. *Ib.*
 10. Whether a title would pass to a purchaser under an execution issued upon a supersedeas judgment, more than three years after its date, depends upon the question whether the writ was void or voidable. If void, no title could pass. If voidable, the purchaser acquires a title. Such process is only voidable. *Ib.*
 11. The question of irregularity in the issuing of a writ of execution can never be discussed collaterally in another suit. *Ib.*
- See EQUITY, 87.
- SCIRE FACIAS, 3.

EXECUTORS AND ADMINISTRATORS.

1. Executors and administrators who may sue, or be sued, in many cases sufficiently represent creditors, legatees or distributees, for whom they are trustees. *Lucas vs. McBlair*, 1.

EXECUTORS AND ADMINISTRATORS.—*Continued.*

2. Where the circumstances are such as to induce an executrix, desirous of acting in good faith, to confess a judgment against her deceased husband's estate, the subsequent discovery by her of a receipt for the money claimed, of which she was utterly ignorant previously, will enable her to apply successfully to a Court of equity for a new trial at law, where the defence may be investigated. *Gardiner vs. Hardey*, 258.
3. One administrator, in nowise assenting thereto, is not liable for the consequences of the negligence or misconduct of a co-administrator. *Ib.*
4. Where executors were sued in a joint writ, but from a failure to arrest one of them, judgments were rendered against them at different terms, and one of them subsequently obtained a decree in equity for a new trial, that Court must, to accomplish its own purposes, direct both judgments to be stricken out. *Ib.*

See EQUITY, 49, 68, 67.

FRAUD.

See EQUITY, 10, 15, 81.

LAND OFFICE, 3.

GUARDIAN AND WARD.

- A guardian cannot incroach on the capital of his ward's estate without the order of the Orphans' Court, nor can the real estate of the ward be diminished, but by the approbation of the Court of Chancery. *Hatton vs. Weems*, 57.

See WILLS, 6.

HUSBAND AND WIFE.

1. By the Act of 1798, chap. 101, the right of a surviving husband to sue for the personal estate of his deceased wife is conferred, just as if he had administered upon her estate. *Hatton vs. Weems*, 57.
2. When the assets are in Maryland, the right to sue exists, though the wife may have died in another State. *Ib.*
3. Marriage and issue born alive, entitle a surviving husband to recover the personal property, and the rents and profits of the lands of a deceased wife. *Ib.*
4. Where a married woman, who has a separate estate during coverture, was furnished with articles suitable to her condition in life, for the use of the house in which she dwelt with her husband and family, and both before and after the decease of her husband, who was insolvent, promised to pay for them generally, and also as soon as she received her dividends from a specified portion of her estate, in an action at law, brought by the vendor after the husband's death, to recover the value of the articles so furnished, against the wife, the survivor, the Court will not instruct the jury, that there was no evidence that the private and separate estate of the defendant was ever pledged originally for the payment of the plaintiff's claim; nor, that there was no evidence that the goods were furnished at the request, or upon the promise of the defendant. *Gray vs. Crook*, 163.
5. Neither will the Court in such case instruct the jury that the proper jurisdiction over the claim of the plaintiff (if any existed,) was vested in a Court of equity. *Ib.*

HUSBAND AND WIFE.—*Continued.*

6. Where the legatee of personal property dies before, and his widow survives, the testator, she is entitled to the same proportion of it, as if her husband had also survived him, and died intestate, as where there are children, to one-third part. *Harris vs. Harris*, 324.

INSURANCE.

1. A policy of insurance against fire, upon a vessel, building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties in the present contract. *Mason vs. Franklin Fire Ins. Co.* 320.
2. In a valued policy against fire, "on a new barque now being built," it was the design of the parties to cover the vessel in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be her progress towards completion, when the fire occurred. *Ib.*
3. The policy, in the absence of proof of usage, did not attach upon articles made for the vessel, delivered in the ship yard where she was constructing, in a condition, and intended to be fitted and attached to her, if she had been, or as soon as she might be ready to receive them. *Ib.*

INTEREST.

See EQUITY, 47.

NEGROES AND SLAVES, 3.

JUDGMENT.

1. D. on the 6th February, 1822. executed a mortgage of a tract of land to M. to secure a debt due him. On the 12th March, 1821, T. recovered a judgment at law in the county where the land lay, against D.; but not having sued out execution within a year and a day, on the 21st February, 1823, issued a *scire facias* to revive his judgment. On the 9th March, 1824, obtained a *fiat* and a *feri facias* on the 6th April following. Under this writ, the mortgaged premises were levied on, and sold. *Held*, that the mortgagee could not maintain ejectment against the purchaser. *Murphy vs. Cord*, 123.
2. As against a mortgage, executed within a year and a day after the rendition of a judgment at law, the lien of a judgment will prevail, though the plaintiff has occasion from lapse of time to revive his judgment before he can sue out execution. *Ib.*

See APPEAL AND ERROR, 6.

EQUITY, 58.

EXECUTION, 8.

EXECUTORS AND ADMINISTRATORS, 4.

LIMITATIONS, 5.

SCIRE FACIAS, 3.

TAXATION, 16.

JUSTICE OF THE PEACE.

See APPEAL AND ERROR, 8.

LAND OFFICE.

1. A warrant of resurvey gives the holder thereof a prior right according to its seniority, to acquire a title to all the vacancy contiguous

LAND OFFICE,—*Continued.*

to his tract of land; but at the same time the law exacts due diligence according to the rules of the land office, from such a holder, to perfect his equitable title in due season, or protect himself from the operation of other surveys which may conflict with his rights, and which he did not (as he might have done,) caveat. *Steyer vs. Hoye*, 138.

2. No land can be taken up under a warrant of resurvey as vacancy, but that which lies adjacent to the tract resurveyed. It may extend to the lines of other tracts, but not beyond or over them. *Ib.*
3. Where a tract of vacant and unpatented land may be affected by one of two outstanding warrants, the fact that the one, which has not the prior right, did execute his survey, and proceed to procure a patent in the absence of a caveat before the other, is not a circumstance from which a Court of equity will infer fraud. *Ib.*
4. It is a general and well established rule of the land office, that no patent shall be issued for any land for which a patent has been previously granted, yet it often happens from inattention or accident, that this rule is not observed, and therefore it has been laid down from a very early period, that a patent always gives title by relation from the date of the certificate, special warrant, or entry in the surveyor's book, on which the land has been particularly designated and described. *Per BLAND, J. L. O. Ib.*
5. For this purpose a warrant of resurvey is considered as a special warrant, binding from its date, so that by this legal relation to the date of the certificate or special designation, the evils which may arise from there being apparently two legal titles, derived from the same grantor, for the same land, may be in a great measure easily corrected. *Per BLAND, J. L. O. Ib.*
6. Where there are remaining in the land office two certificates, held by different persons, for the same land, upon which no patent has been issued, the holder of the elder certificate may by caveat prevent a patent from issuing on the younger one; but if he does not do so, and a patent is obtained on the junior certificate, a patent will not upon a caveat be granted upon such elder certificate. *Per BLAND, J. L. O. Ib.*
7. All proceedings in the land office being public, and open to all persons, it may fairly be presumed, that the holder of the elder certificate, knew of and waived all objection to the issuing of a patent upon the junior certificate. *Per BLAND, J. L. O. Ib.*
8. A patent obtained upon a junior as against an elder certificate, or special warrant, by reason of the negligence of the holder of such elder certificate or special warrant in not attending to his prior rights, or not filing a caveat, is valid; and may destroy the continuity of an adjacent vacancy, for which otherwise the holder of the elder certificate might have procured a patent. *Ib.*
9. A caveat may be entered at any time before, but not after a patent has been actually signed by the Governor and Chancellor, and the great seal affixed thereto. *Ib.*

LIEN.

Where it was held, that a lien existed for the payment of certain bonds of conveyance executed by A. (who subsequently became an insol-

LIEN.—*Continued.*

vent debtor), out of the proceeds of the land, as against him, his trustees and judgment and general creditors. *Repp vs. Repp*, 235.

See EQUITY, 83, 84, 85, 87.

SURETY, 4.

LIMITATIONS.

1. Upon a bill filed to sell real estate for the payment of debts, upon the ground of insufficiency of the personal estate of the deceased to satisfy them, the acknowledgment of the heir-at-law and devisee of the debtor, that "it was a debt he would have, and intended to pay," is sufficient to remove the bar of the statute. *Hall vs. Creswell*, 26.
2. The Statute of Limitations runs against a claim or debt up to the time it is exhibited or filed in Chancery. *Ib.*
3. Where a claim arises upon a bond of indemnity, it is not barred until after the principal debtor and creditor have been both dead twelve years, or the thing in action has been above twelve years standing. *Ib.*
4. Promissory notes, dated 10th March, 1814, at sixty days, were discounted for the use and accommodation of the second endorser, the prior parties being only securities. Suits were brought upon them by the holder against the securities in 1815, and judgments obtained against them in September, 1816. They were paid on the 20th August, 1818, more than three years after the maturity of the notes. The second endorser died in April, 1814. *Held*—That as respects the accommodation endorser, the running of the statute was suspended by the suit brought against him, and the judgments obtained thereon, and that the payment made by him on the 20th August, 1818, by coercion of law and under *fi. fa.* gave him a right to be re-imbursed out of the real estate of his principal, upon a bill filed by him in 1819 against his heirs, and to which the Statute of Limitations opposed no bar. *Ib.*
5. Where judgments were recovered against a principal and surety, and the surety paid them with money advanced by a third party, and then the plaintiff in the judgments assigned them to the surety, who assigned them to the third party making the advance, covenanting in the assignment that a pre-existing mortgage from the surety to the third party should be responsible for the advance, the third party will not be deemed the purchaser of these judgments, but will hold them as collateral security for his advance. The right to the judgments, (in a Court of equity,) is in the surety, subject to the equitable rights of the third party—the assignee. Therefore, a bill filed by the surety against the real estate of the principal, (now deceased,) within three years from the payment of the judgments, prevents the running of the Statute of Limitations, though the party making the advance did not become a party to the bill for more than six years thereafter. *Ib.*

See SURETY, 2.

LOTTERY.

1. It was the object of the Act of 1889, chap. 31, to prohibit in future, all lottery grants by the Legislature, and all grants of licenses to deal in lotteries by the lottery commissioners, so far as it could be done

LOTTERY.—*Continued.*

- without affecting antecedent or prior vested rights, secured by a constitutional sanction. *Lucas vs. McBlair*, 1.
2. The Act of 1889, chap. 31, was not confined to grants of lottery privileges by the Legislature, but was intended to cover the whole system of dealing in lotteries, and to prohibit the granting of licenses by the Lottery Commissioners, and the sale of schemes by them, except as to existing private lottery grants; and the power the Legislature before possessed of regulating such private grants, and the means by which they might be more effectually and speedily accomplished. *Ib.*
 3. By the Act of 1816, chap. 89, the Visitors and Governors of W. College were authorized "to propose a scheme or schemes of a lottery for raising a sum not exceeding. &c. clear of all expenses, and to dispose of, or sell all or any of the tickets of said lottery or lotteries, and to draw the same, or to authorize any other persons to draw the same," &c. By the Act of 1821, chap. 16, the V. and G. of St. J's College were authorized "to propose a scheme or schemes of a lottery or lotteries for raising a sum not exceeding, &c. and to sell such scheme or schemes to any persons whatsoever, and the purchaser or purchasers thereof, are hereby empowered to sell and dispose of the tickets in the said lottery or lotteries." Upon these Acts it was held—
 - (1.) The assignees, of the V. and G. of the Colleges, of the franchises created by those Acts, possessed no greater powers than their assignors.
 - (2.) The terms of those Acts are unambiguous.
 - (3.) They communicate an authority to propose a scheme or schemes for raising a limited amount.
 - (4.) When the schemes for raising that amount have been proposed and drawn, the authority given by those Acts has performed its office, whether the letter of the Act or the legislative intent is regarded.
 - (5.) It was the intention of the Legislature, that the sum specified should be raised; it gave adequate means for its accomplishment; it was the duty of the owner of the schemes, in the exercise of his franchise, previously to drawing such schemes, to have sold all the tickets. In that mode was the amount authorized to be raised.
 - (6.) It being admitted that if all the tickets had been sold, in the schemes which have been drawn under the Acts of 1816 and 1821, that a larger amount would have been raised than was authorized by them, the franchise thereby created was held to be exhausted. *Phalen vs. State*, 13.
 4. The Act of 1817, chap. 154, declaring the effect and construction of previous lottery grants, so far as to show under what circumstances those grants shall be deemed exhausted, must be regarded as of overwhelming influence in the decision of similar questions arising under grants made subsequent to its passage. *Ib.*
 5. Where parties claim to exercise a lottery privilege, under a grant which in point of law is exhausted by proceedings under it, the parties so claiming and acting may be restrained by injunction. *Ib.*
- See EQUITY, 1, 4, 5.

MORTGAGE.

Where there is a senior and a junior mortgage, by the same mortgagor, of the same land, to different parties, and both file a bill, and obtain a decree for a sale, but the sale in fact took place under the proceedings upon the senior mortgage, there is no objection to the junior mortgagee claiming payment of his debt out of the surplus, after the discharge of the elder mortgage debt. *Lee vs. Boteler*, 223.

See EQUITY, 56, 58.

JUDGMENT.

TAXATION, 15.

NEGROES AND SLAVES.

1. Where it is necessary to determine the value of the hire of negroes, by an average of opinions, the estimates of those who did not know the negroes, ought not to be mixed up with, and allowed equal weight and influence with the valuations of those who did know them, and who testified from such their personal knowledge. *Lee vs. Pindle*, 197.
2. In making such estimates, proper allowances ought also to be made for the expense of maintaining and clothing the whole, as well those incapable of labor, as those able to work; and the hire of those killed by accident, ought not to be carried further than the day of the death. *Ib.*
3. Interest may be charged on the annual hire of negroes or value of their services, where it constitutes a debt, from the time it becomes due and payable. *Ib.*

See EQUITY, 46, 47.

WILLS, 16, 17.

NEW TRIAL.

See EXECUTORS AND ADMINISTRATORS, 2, 4.

ORPHANS' COURT.

See APPEAL AND ERROR, 9, 10, 11.

PARTNERSHIP.

See EQUITY, 39, 41.

PAYMENT.

See SURETY, 1.

PLEADING.

1. The defendant who pleads a discharge under the insolvent laws, upon an issue joined of *nul tiel record*, replied by the plaintiff in the action, must produce before the Court all the proceedings in the matter of his petition for such relief, and show their conformity to the Acts of Assembly in such case made. *Mackall vs. Farmers Bank*, 119.
2. The docket entries made by the clerks of the County Courts in such cases, are not equivalent to a record of the proceedings. *Ib.*
3. Defences arising after the commencement of an action, should be pleaded *purs darrein continuance*, or against the further maintenance of the suit. *Semmes vs. Naylor*, 247.
4. In an action of debt to recover a statutory penalty, the defendant moved in arrest of judgment, because the declaration did not con-

PLEADING.—*Continued.*

clude "against the statute in the case made and provided;" nor contain any "averment that the offence was committed contrary to the statute on which the suit was brought," nor any "averment that the offence was committed contrary to any statute." but *Held*, that the words "whereby and by force of the statute in such case made and provided, the said sum became forfeited" found in the *narr.* were a sufficient compliance with the rules of pleading. *Ib.*

See COVENANT, 2.

EQUITY, 2, 6, 7, 33, 34, 35, 37, 51, 65.

PRACTICE.

See EQUITY, 19, 62, 73.

PRINCIPAL AND AGENT.

See DEBTOR AND CREDITOR, 1.

PROMISSORY NOTES.

See ATTACHMENT, 2.

LIMITATIONS, 4.

SALE.

See EQUITY, 87.

EVIDENCE, 6.

EXECUTION, 4, 10.

SCIRE FACIAS.

1. Upon a judgment in favor of A. and B. the counsel of the surviving plaintiff A. ordered the clerk of the County Court to issue a *scire facias*, directing it in writing in the name of the survivor. The writ in fact was issued in the name of both the original plaintiffs. Upon motion of the administrator of the survivor, who had become a party since the writ was sued forth, the Court ordered a duplicate of the original *scire facias* which had been lost, to be made out and filed, and then ordered an amendment of the writ, so as to conform to the plaintiffs' original instructions. Affirmed upon appeal. *Byrne vs. McPherson*, 112.
2. Where by the docket entries it appeared before judgment confessed, that the defendant's discharge had been suggested, it is no variance that a *scire facias* upon the judgment had been issued without reference to such suggestion. *Mackall vs. Farmers Bank*, 119.
3. Upon a *scire facias* to revive a judgment against the original defendant, the alienees of his land after the judgment within a year and a day, need not be made parties, for the purpose of enabling the plaintiff to levy upon such lands, under his revived judgment. *Murphy vs. Cord*, 123.

See EXECUTION, 9.

SET-OFF.

The right of set-off is reciprocal, and mutual claims, and such as are in the same right, can alone be set-off. *Hall vs. Creswell*, 26.

See EQUITY, 71.

STATUTE OF FRAUDS.

See WILLS, 5.

STATUTES.

I. CONSTRUCTION AND EFFECT.

1. Where the object of the Legislature in passing a statute, was the suppression of a great moral evil, the construction of it should be benign and liberal, and not so restricted as to leave much of the mischief designed to be suppressed, the chance of still being successfully pursued. *Lucas vs. McBlair*, 1.
2. The title and preamble of an Act are, strictly speaking, no parts of it, though they may be resorted to in explanation of the enacting clause, if it be doubtful; or to restrain its generality, when it would be inconvenient if not restrained. *Ib.*
3. The reservation, "further and other remedy may be provided by law in the premises as the Legislature may enact," contained in the Act of 1804, chap. 55, sec. 3, a part of the amended Constitution of this State, relating to the removal of criminal causes, was intended specifically to authorize a detailed system, prescribing, the "manner and terms," to be observed by parties entitled to the right. *Cromwell vs. State*, 177.
4. The Act of 1805, chap. 65, sec. 49, is not repugnant to the Act of 1804, chap. 55, sec. 3. *Ib.*
5. It is only a plain and palpable contradiction of their enactments, that will induce the Court to say that one Act of the General Assembly violates another. *Ib.*
6. It is a rule in the exposition of statutes, that the will of the Legislature is to be regarded, and carried into effect, so far as they keep within the limits prescribed to them by the Constitution or fundamental law. *State vs. B. & O. R. R. Co.* 279.
7. In ascertaining such will or intention, the rule is, that if divers statutes relate to the same thing, they ought to be all taken into consideration in construing one of them. *Ib.*
8. It is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to one system, and construed consistently. *Ib.*
9. The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense. *Ib.*
10. The term forfeit, in common parlance, strongly implies penalty. It is not the language of convention or contract, but is mandatory in its character. *Ib.*
11. Although the right of expounding laws belongs to a different department of the Government than the Legislature, still the sense of the Legislature, subsequently expressed upon the subject of laws of doubtful import, is a circumstance not entirely to be disregarded. *Ib.*

See COMMISSIONERS.

II. BRITISH STATUTES.

12 Car. 2, c. 24. *Dorsey vs. Sheppard*, 181.

III. ACTS OF ASSEMBLY.

1778, c. 21. *Miles vs. Knott*, 300.

STATUTES.—Continued.

- 1795, c. 56. *Dawson vs. Brown*, 34; *Washington vs. Hodgskin*, 243;
Didier vs. Kerr, 343.
 1795, c. 88. *Luckett vs. Jay*, 46.
 1798, c. 101. *Hatton vs. Weems*, 57; *Offutt vs. Gott*, 268.
 1804, c. 55. *Cromwell vs. State*, 177.
 1805, c. 65. *Cromwell vs. State*, 177.
 1810, c. 34. *Dorsey vs. Sheppard*, 131.
 1816, c. 89. *Phalen vs. State*, 13.
 1817, c. 154. *Phalen vs. State*, 13.
 1820, c. 161. *Hatton vs. Weems*, 57; *Richardson vs. Stillinger*, 326.
 1821, c. 46. *Phalen vs. State*, 13.
 1821, c. 131. *Tax Cases*, 82.
 1823, c. 194. *Miles vs. Knott*, 300.
 1825, c. 117. *Burgess vs. State*, 43; *Gray vs. Crook*, 163.
 1826, c. 200. *Prout vs. Berry*, 195.
 1827, c. 172. *Tax Cases*, 82.
 1828, c. 129. *Lucas vs. McBlair*, 1.
 1830, c. 185. *Clagett vs. Crawford*, 190.
 1831, c. 296. *Tax Cases*, 82.
 1832, c. 302. *Darnall vs. Hill*, 270.
 1835, c. 142. *Tax Cases*, 82.
 1835, c. 395. *State vs. B. & O. R. R. Co.*, 279.
 1838, c. 392. *Doyle vs. Comm'rs of Balto. Co.*, 332.
 1839, c. 31. *Lucas vs. McBlair*, 1.
 1841, c. 23. *Tax Cases*, 82.

SURETY.

1. A security who pays the debt of his principal at par in depreciated bank notes, can only recover the amount given for them, and in the absence of such proof, the payment will be estimated at the current market price at the time of the payment. *Hall vs. Creswell*, 26.
2. Securities in a bond who pay off the debt, may recover separately the sums respectively paid by them, and the evidence which one of them may have to rebut the plea of limitations, does not necessarily enure to the benefit of the other surety. *Ib.*
3. G. was the deputy sheriff of S. and gave bond with B. as his surety. both were sued to judgment; after this, G. with J. as his surety, gave an injunction bond, and procured an injunction to stay proceedings upon the judgment against him. His bill was finally dismissed. In an action upon the injunction bond entered for the use of B. against J. the surety, who pleaded that G. had prosecuted his injunction with effect, and performed all he was bound to do by the condition of that bond; it appeared that B. the equitable plaintiff, had paid off the judgment against him, part before and part after the commencement of the action against J. *Held*, that under the state of the pleadings, the defendant J. could not give in evidence the payment by B. made after the commencement of this action, and that B. by virtue of his payment of the original judgment against him, was not entitled to an assignment from S. of the injunction bond, so as to enable him to proceed against J. The principles of contribution between co-sureties do not apply to such a case. *Semmes vs. Naylor*, 247.

SURETY.—*Continued.*

4. The surety in the first bond would be entitled on the ground of substitution, to the benefit of any lien upon his own property, either real or personal, which the principal debtor might give to the creditor, as a security for the payment of his debt, or as the means of re-imbursement and indemnity against loss, if in his character of surety he should be compelled to satisfy such debt, and that, no matter when the lien was created. *Ib.*

See CONTRACT.

COVENANT, 3, 5.

EQUITY, 52, 54, 57-60.

LIMITATIONS, 5.

WILLS, 12.

TAXATION.

1. The State has the power to exempt from taxation particular items of property, to the extent proposed in the Act of March, 1841, chap. 23; as also in the charters of the Baltimore and Susquehanna Railroad Company, Act of 1827, chap. 172, sec. 20, and the Philadelphia, Wilmington and Baltimore Railroad Company, Act of 1831, chap. 296, sec. 19. *Tax Cases*, 82.
2. The 7th and 11th sections of the Act of 1821, chap. 131, are to be regarded as securing the banks from further tax or charge for their franchise or banking privilege, but not as exempting the property belonging to such banks, or the shares of stock therein held by individuals, from taxation. *Ib.*
3. The property of a bank being represented by the shares of stock therein, both cannot be taxed; and therefore, when the tax is imposed on the stock in the hands of shareholders, the property of the bank, real or personal, cannot also be taxed. *Ib.*
4. The stock of the banks in Baltimore in the hands of shareholders was rightfully taxed, but the Appeal Tax Court erred in taxing the real and personal property of the same banks. *Ib.*
5. The banks in the City of Baltimore, incorporated before and after the year 1821, are in the same condition, as to the exemption of the banking privilege from taxation—at all events, the Act of 1835, chap. 142, must have relieved the case of all doubt as to the banks claiming under that law. *Ib.*
6. Non-residents of the State are liable to the tax in respect of stock held in the banks of this State, as well as residents here. *Ib.*
7. It also results, that as the stock is the representative of the property of a company, the exemption of the one must be considered as the exemption of both, unless the exemption be made on the ground of selection, to show which is intended to be taxed to the exclusion of the other. *Ib.*
8. In the case of The Baltimore and Susquehanna Railroad Company, Act of 1827, chap. 72, sec. 20, the stock is expressly exempted, and the whole object would be defeated by taxing the property; the mortgage executed to the State, cannot exempt the property mortgaged from taxation in the hands of the company mortgagor. *Ib.*
8. In the case of the Philadelphia, Wilmington and Baltimore Railroad Company, the Legislature, by the same Act (1831, chap. 296, sec. 19,) which exempts the stock, reserves the right to tax the fixed and

TAXATION.—*Continued.*

- permanent works of the company, the tax on the property thus excepted from the exemption is proper on the ground of selection. *Ib.*
- 9. The tax in that case has been imposed according to the exception: the bed of the road, the rails, buildings and steamboat being within it; the principle of valuation adopted is proper: taxing the buildings, steamboats and rails, as of the value they bear, irrespective of their being portions of a railroad, and taxing the land as land, and not as of increased value by reason of its being used as a railroad. *Ib.*
- 11. The charitable and literary institutions excepted in the Act of 1841, are properly considered as exempted. *Ib.*
- 12. The exemption of the Act of March, 1841, chap. 23, also protects from taxation all "houses of public worship and burying grounds," but not bank stock or other property held by or in trust for religious institutions, whether incorporated or otherwise. *Ib.*
- 13. Shares in the hands of stockholders in the Insurance Companies being taxed, the stock held by the companies as part of their property cannot also be taxed. *Ib.*
- 14. A bank, as in the case of The Farmers and Merchants Bank of Baltimore, being the holder of its capital stock, is not liable to be taxed thereupon. *Ib.*
- 15. A mortgage in the hands of the mortgagee is liable to be taxed as an item of his property—though all his other property, a part of which was mortgaged, is also taxed, and he cannot claim to deduct the sum he owes, from the sum due to him on mortgage. *Ib.*
- 16. A literary institution whose property is exempt from taxation, confessing a judgment to enable the plaintiff in the judgment to borrow money for it, does not exempt such judgment in the hands of such plaintiff from being taxed. Protection to the institution, does not protect those who deal with it. *Ib.*

TRUSTS AND TRUSTEES.

- 1. A trustee ought not to incur expenses, impairing the principal of *c. q. t.* estate, without the approbation of a Court of Chancery. *Hutton vs. Weems*, 57.
- 2. Expenses which a trustee must necessarily incur, and which can be clearly and satisfactorily seen by the Court, ought to be allowed, as the Court on application at the proper time would have allowed them. *Ib.*
- 3. If a trustee has mixed trust property with his own: kept no accounts of the produce of the labor of slaves held in trust, nor of their clothing and maintenance, nor of the clothing of his *c. q. t.*; then by reason of his own misconduct and negligence, he is liable to have his expenses set down at their lowest estimate. *Ib.*
- 4. When it was in question what allowances should be made a trustee for raising infant slaves, and the same estate had been under the care of a receiver of the Court, when similar expenses had been incurred, the Court as against a delinquent trustee who has kept no account, considered the actual disbursements of the receiver as furnishing a better guide to truth and justice, than an average of the opinions and estimates of witnesses, of what, in their judgments, would be a fair price. *Ib.*

TRUSTS AND TRUSTEES.—*Continued.*

5. The Chancery Court for attaining justice, where the record furnishes no other means of arriving with more certainty at the truth, will average testimony of values; but this rule has exceptions, and is not of universal application. The opinions of persons accustomed to furnish boarding and lodging, is of more value than opinions estimating the value of such services without actual experience; neither, however, is conclusive, but the Court will consider the relation of the parties, and other circumstances, as between trustee and *c. q. t. Ib.*
6. A trustee, under circumstances, allowed the whole income of his *c. q. t.* for board and maintenance, and taking care of her real and personal estate; and also in analogy to executors and administrators, was allowed commissions on the products of real estate, and on the income of the personal estate, and the value of the latter as it came to his hands. *Ib.*

See COMMISSIONERS.

EQUITY, 31, 52, 53, 54, 56-59.

EXECUTORS AND ADMINISTRATORS, 1.

WILLS, 10-14.

USAGE AND CUSTOM.

See INSURANCE, 1, 3.

WAGER.

1. By the Act of 1838, chap. 392, sec. 3, every deposit of money as a wager or bet upon elections, is forfeited, and to be paid over to the Levy Court or County Commissioners of the county. The forfeiture attaches to the deposit the moment it is made, and the Courts or Commissioners may recover the same in their own names. *Doyle vs. Comm'rs of Balto. Co.*, 332.
2. This being the public law of the land, a knowledge of it is imputed to every person in whose hands such a deposit is made. *Ib.*
3. No notice or warning is necessary to prevent the payment of the deposit to the parties to the bet. If such payment be made, it is at the risk of the person making it. *Ib.*
4. The deposit of a note of the Bank of Virginia, as a wager or bet, is a deposit of money within the Act of 1838, chap. 392. *Ib.*
5. In an action to recover the forfeiture of the deposit under the Act of 1838, the jury may award damages equal to the value of the money forfeited. *Ib.*
6. It is not essential to a recovery under the Act of 1838, that both parties to the bet should deposit money. If either make such a deposit it is forfeited, though the deposit of the other may not be forfeitable. *Ib.*

WILLS.

- H. devised in 1822, to his son and his heirs, a tract of land, in trust, to permit the testator's daughter to have all the rents and profits arising therefrom during her natural life, and after her death to her children lawfully begotten, but if she should die without lawful issue, then I give and devise the said land to my said son and his heirs forever: Another item of the will devised various slaves, male and

WILLS.—*Continued.*

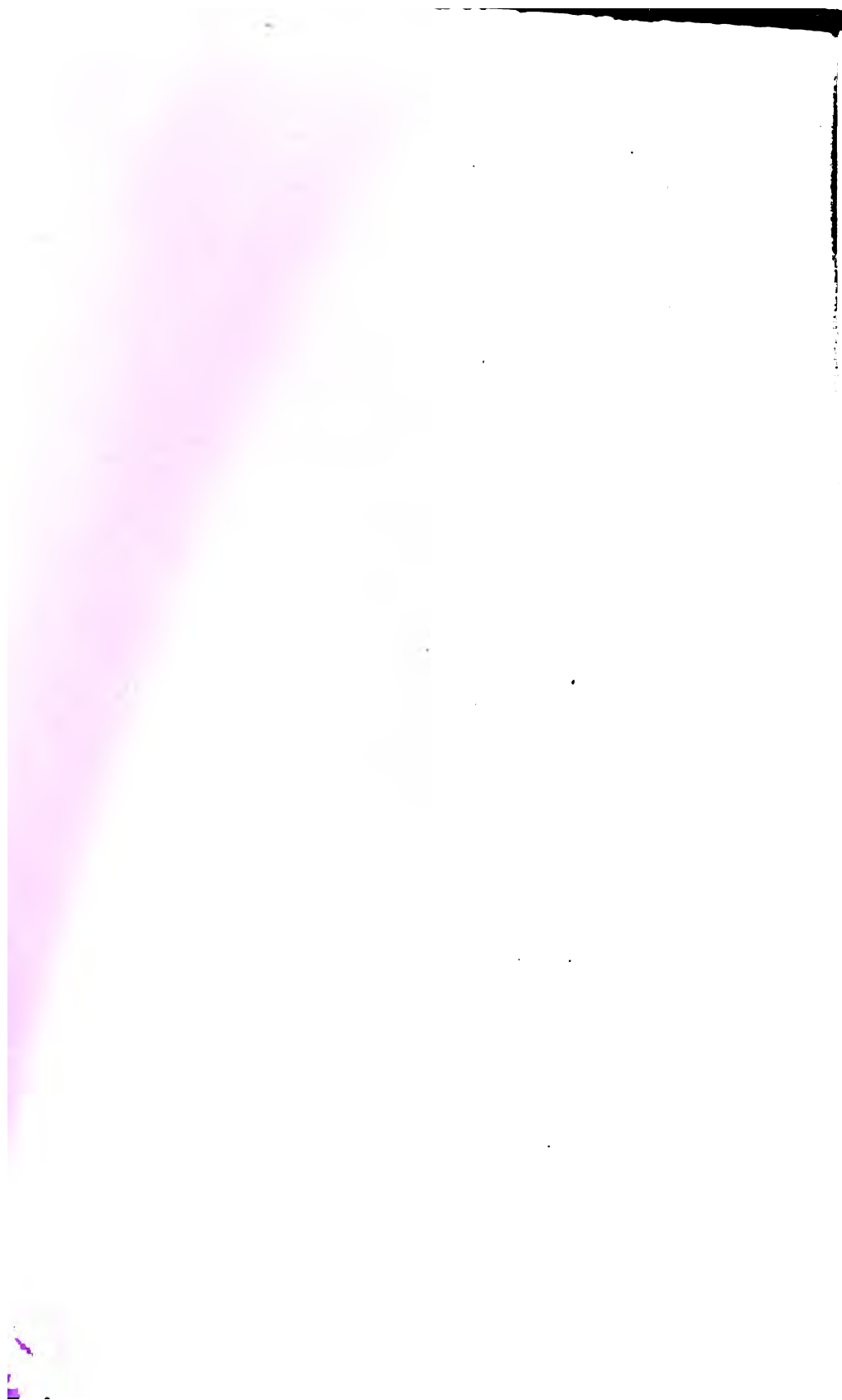
female, "on the same terms," the testator had given the land, and another clause gave also on same terms, one-half of his stock, plantation utensils, and household and kitchen furniture. The testator gave the residue of his estate to his said son, whom he also appointed his executor. Held under this will—

- (1.) That the daughter took an equitable estate tail, which in this State is converted into an estate in fee, in the lands devised to her.
 - (2.) That in the personal property she took an absolute estate.
 - (3.) That the limitation over to the son being after an indefinite failure of issue, is void.
 - (4.) That the bequest being of both male and female slaves, and the testator intending that all should go over on the same event, the character of the subject-matter of the bequest, as in the case of *Briscoe vs. Briscoe*, 6 G. & J. 232, does not make the limitation over valid. *Hatton vs. Weems*, 57.
1. Nuncupative wills are not favorites of the law. *Dorsey vs. Sheppard*, 131.
 2. The *factum* of a nuncupative will must be proved, by evidence more strict, and stringent, than that of a written one. *Ib.*
 3. The testamentary capacity, and the *animus testandi*, at the time of the alleged nuncupation, must appear by the clearest, and most indisputable testimony. *Ib.*
 4. A will made by interrogatory, may be valid; but when so made, the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity, and volition, than it would be in an ordinary case. *Ib.*
 5. A nuncupative will which contains no bequests, which merely appoints an executor, is not subject to the operation of the Statute of Frauds in relation to such testaments; nor to that of the Act of 1810, chap. 34. *Ib.*
 6. A written will, by the Statute 12 Car. 2, chap. 24, is indispensable to the appointment of a testamentary guardian. *Ib.*
 7. When the want of mental capacity to make a will, is urged as the ground of objection to the probat of a nuncupation, it is the duty of the party offering such will, to prove such capacity by the clearest testimony. *Ib.*
 8. Where the testimony leaves the mind in a state of doubt as to the capacity of the testator to make a nuncupative will, it is the duty of the Orphans' Court not to admit it to probat. *Ib.*
 9. Where a nuncupative will is drawn from the decedent by interrogatories, full and clear proof of spontaneity of the *animus testandi* is indispensable. *Ib.*
 10. Where a testator appoints a trustee, and directs a sale of his real and personal estate by him, the proceeds constitutes an aggregate of personal estate, which can only pass as such. Legacies for life, with remainder over in such cases, only entitle the tenant for life to annual interest on dividends. *Per BLAND*, Chancellor. *Clagett vs. Crawford*, 190.
 11. The petitions of various legatees under such a will, in the same Court, being in relation to the same subject-matter, must be treated

WILLS.—*Continued.*

- as one entire and blended course of judicial proceedings, to which such legatees are all considered as parties. *Per* BLAND, C. *Ib.*
12. Where some of the co-legatees in such a case were sureties for the trustee, who sold the land and wasted the funds, and the nature and extent of their liability as sureties appeared on the record, they can receive nothing until the other co-legatees are paid in full their portions of the misapplied funds. *Per* BLAND, C. *Ib.*
 13. Although it is true as a general rule, that where money is directed to be invested on good security, it cannot be put out on mere personal security of any kind, yet where a testator has recognized the propriety of making an investment in stocks, bonds or other securities, any such securities as have been received by the trustee under his will, may be considered as a proper investment, unless it should appear they had been since lost by his misconduct or negligence. *Per* BLAND, C. *Ib.*
 14. In such case, the trustee would be held accountable as for so much money, for all mere simple contract evidences of debt below the grade of specialty securities, received by him. *Per* BLAND, C. *Ib.*
 15. A will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable; but if there be any conflict or repugancy between them, the codicil, as the last indication of the testator's mind, must operate in preference to the will. *Lee vs. Pindle*, 197.
 16. Where it was held that by the codicil to a will, certain slaves were given to the widow of the testator for life, and at her death to the children named therein, and that the pecuniary legatees under the will, and the personal representatives of the widow could not be affected by the decree in this cause, and were not therefore necessary parties. From the death of the widow, the hire and profits of the negroes ceased to be a fund for the payment of legacies. *Ib.*
 17. Neither were the legatees of the slaves, under the codicil, obliged to await the expiration of a certain term of years specified in the will before they could claim the negroes and their hires. Their rights attached immediately upon the death of the widow. *Ib.*
- See* APPEAL AND ERROR, 9, 11.
EQUITY, 50.





REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland,
AND IN THE
HIGH COURT OF CHANCERY OF MARYLAND,
FROM
FIRST HARRIS & MCHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.

ANNOTATED BY
WILLIAM T. BRANTLY,
OF THE BALTIMORE BAR.

VOLUME XXVI.
CONTAINING THE FIRST VOLUME OF GILL'S REPORTS.

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NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.

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Hon. THEODORICK BLAND, Chancellor.

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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

* JUNE TERM, 1843.

THE STATE, use of URATH STEVENSON *vs.* PHILIP REIGART. **1**
June, 1843.

A testator devised a sum of money to his two grand-daughters, as and for their absolute property, to be taken and set apart for that purpose, out of his personal estate, and paid them as soon as conveniently may be done after his decease; the same to be understood as bequeathed unto them as their property respectively, and not to either of their respective husbands or their father, nor their step-brothers or step-sisters. The sum devised to one of the females, was demanded by her husband from the executors, and paid over to him by them upon a special agreement. In an action brought by the legatee against the administrators of her deceased husband to recover the money received by him. *Held*, that it was not material whether the will gave her an absolute or a separate estate, and that her rights must depend upon the validity or invalidity of the agreement, in virtue of which the money was paid over to her deceased husband. (a)

A contract founded upon an equitable duty, such as would be enforced by a Court of equity, or upon a moral obligation, which no Court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of a legal right by the party entitled to it, is maintained by a sufficient consideration. (b)

The executors in this case held the wife's legacy as trustees; and wherever it is necessary for a husband to resort to a Court of equity to get posses-

(a) Cited in *Bowie vs. Stonestreet*, 6 Md. 430; *Bayne vs. State*, 62 Md. 106. See also *Stevenson vs. Shriver*, 9 G. & J. 203; *Frisby vs. Parkhurst*, 29 Md. 67.

(b) Approved in *Whitridge vs. Barry*, 42 Md. 151; *Drury vs. Briscoe*, *Ibid.*, 163; *Mackey vs. Daniel*, 59 Md. 489.

- sion of his wife's legacy, that Court will require him to do equity by making a settlement upon his wife and children, before it will lend him its aid in the * recovery of it; and a promise by the husband to the executors to do that which equity would do in this case, is founded upon a sufficient consideration.

Where the husband receives the money of his wife, not in virtue of his marital rights so as to amount to a reduction into possession, but as her trustee and for her benefit, on the death of the husband it continues to be her property, for which she has a claim against his estate, and does not go to his personal representatives.

The agreement being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, which a Court of equity would specifically execute against the husband upon a bill filed for that purpose.

It has been settled by this Court, that the wife's equity will prevail against an assignment of the husband for valuable consideration, or in payment of a just debt. (c)

Where the husband receives his wife's legacy from the executors of a testator, making her a bequest, and promises to invest the money for her, does not invest according to the terms and conditions under which he received the legacy, and dies, his widow has a right to elect to consider him her debtor to the amount of it, as so much money had and received to her use. (d)

Where the merits of an action at law depended in every aspect of it, upon the true construction of an agreement, every prayer which went to the right of action, and kept out of view the effect of the agreement, and so did not involve the true point of controversy between the parties, is considered as wholly abstract. (e)

A Court is not to be called upon to settle legal principles which have no relevancy to the case before them. (f)

Where the Orphans' Court, upon the application of a creditor of a deceased person, and the exhibition of the proof of his demand, passes a claim to be allowed, if paid by the executor or administrator, and upon appeal that order is reversed, such reversal constitutes no bar to the recovery of the same claim at law. The Orphans' Court possessed only a *prima facie* jurisdiction, and the exercise of the appellate jurisdiction did not increase its effect. (g)

An executor may interpose to protect the wife's equity in property under his control.

Ignorance of the law cannot be made available where there is a full knowledge of all the facts. (h)

(c) Cited in *Oswald vs. Hoover*, 43 Md. 369. Cf. *Duvall vs. Bank*, 4 G. & J. 197.

(d) Cited in *Oswald vs. Hoover*, 43 Md. 371. See *Buchanan vs. Deshon*, 1 H. & G. 199; Rev. Code, Art. 51, sec. 19.

(e) Cited in *Crawford vs. Beall*, 21 Md. 234.

(f) Approved in *Wilson vs. Wilson*, 37 Md. 18.

(g) Cited in *Warford vs. Colvin*, 14 Md. 556; *Frisby vs. Parkhurst*, 29 Md. 67.

(h) Cited in *Young vs. Frost*, 1 Md. 400. See *Lammot vs. Bowly*, 6 H. & J. 410; *Baltimore vs. Lefferman*, 4 Gill, 425.

An executor or administrator may retain the amount of a debt due him by his * deceased testator or intestate, out of his estate, or its due proportion, of assets, without passing his claim before the Orphans' Court. 3

The Act of Limitations does not apply to the claim of an executor against his testator, who retained for his debt. He could institute no suit at law against himself. (i)

APPEAL from Baltimore County Court. This was an action of debt, commenced on the 12th October, 1837, by the appellant against the appellee and Oliver Holmes.

The plaintiff below declared on the bond of Elizabeth L. Stevenson, Philip Reigart, H. Niles and Oliver Holmes, dated 17th March, 1832, for \$25,000, conditioned, that if the above bounden E. L. S. and P. R. should well and truly perform the office of administrator of Josias Stevenson, Junior, late of Baltimore County, deceased, according to law, &c., then to be void.

The breach assigned was, that Urath Stevenson, executrix of Josias Stevenson, recovered a judgment in Baltimore County Court against E. L. S. and P. R., as administrators of J. S., Junior, deceased, for as well the sum of \$1,000, as, &c., which was still unpaid, though the administrators had assets to satisfy the same. Writ of *fi. fa.* returned *nulla bona*, &c.

The defendants appeared and pleaded general performance, with an agreement, that the defendants should, under the plea of performance, be at liberty to give in evidence insufficiency of assets and any other matters that could be given in evidence under any plea to the merits. Seven days' notice before the time of trial of such other matters being first given to plaintiff's attorney. All errors in pleading on both sides waived.

It was also agreed, that if the jury reject the claim of Elizabeth Schriver, they shall find a general verdict for the plaintiff for the amount of the judgment offered in this case. If they find in favor of the said claim, they shall find a verdict for the plaintiff for \$400. If the jury find in favor of E. S. Schriver's claim, its assets shall be marshaled, and the amount of them, as well as the amount of the debt, ascertained by John Glenn and David Stewart, Esquires, and the judgment to be released on payment of such sum as they shall ascertain to be due.

*If the jury find the claim of E. L. S., a like marshaling of assets shall be made by J. G. and D. S., Esq's, and judgment to be released upon payment of the amount ascertained by them. 4

In all other suits upon the administration bond like judgments to be entered, a like marshaling of assets to be made by J. G. and D. S.,

(i) Approved in *Semmes vs. Young*, 10 Md. 247; *Spencer vs. Spencer*, 4 Md. Ch. 485.

and like releases to be entered upon their amount. Nothing herein to prevent the plaintiff from appealing.

A commission to take proof was issued by consent to Lancaster.

It was then admitted that Oliver Holmes had died since his appearance; that Josias Stevenson, Junior, died, and letters on his estate were issued to E. L. S. and P. R. in 1832, and that J. S., Jr., and Elizabeth Reigart were married in 1827.

The jury found a verdict for the plaintiff, and assessed her damages at \$400.

At the trial of this cause, the plaintiff offered in evidence to the jury, the following judgment, *feri facias* and return of said *feri facias*, to wit:

Urath Stevenson vs. Philip Reigart and Elizabeth Stevenson, administrators of Josias Stevenson, Jr. In Baltimore County Court, January Term, 1837. Case. 23rd March, 1837, judgment by confession for \$800 damages in the *narr.*, and costs of suit; the damages to be released on payment of \$350, with interest from the 2nd day of July, 1832, and costs. To bind assets. Plaintiff's costs \$9.73½. 24th April, 1837, *fi. fa.* issued to May Term, 1837. Returned *nulla bona*.

Test:

THOS. KELL, Cl'k Balto. Co'ty Court.

The plaintiff also proved that administration upon the estate of the said Josias Stevenson, Junior, had been duly committed to Elizabeth L. Stevenson, his widow, and to the defendant, on the — day of —, in the year 1832, and that assets came to their hands, but not to an amount sufficient to pay all claims against said estate.

The defendant then offered in evidence to the jury an admitted copy of the last will and testament of Dr. Albert Dufresne, who departed this life some time in the year 1823, and that his said will was

5 duly proved, and that letters testamentary * were duly granted on the 13th day of August, 1823, to Dr. Samuel Dufresne and Peter Reed, two of the executors therein named; that Maria Reigart, one of the legatees therein named, afterwards departed this life, in her minority, without leaving any child, and without ever having been married, leaving her sister Elizabeth L. Reigart, (named in said testament and last will,) surviving her; that the said Elizabeth L. Reigart afterwards, to wit, on the 27th day of March, 1827, intermarried with the said Josias Stevenson, Junior. The defendant further proved by F. Slower, a competent witness, that he was acquainted with the said Josias Stevenson, Junior, in his life-time, and with the said Elizabeth L. Stevenson, his wife, formerly Elizabeth L. Reigart, and that she is his niece; that some time in the year 1829, the said Stevenson and his wife were at the house of the witness in Philadelphia, and the said Stevenson then said that he wanted his wife's legacy, but that he did not like to go to Lancaster to get it; the reason why he wanted it was, that he could invest it in Baltimore; that it was his intention to invest it in Baltimore for his wife's

exclusive use; that he wanted to protect the money for his wife. Witness told him that he considered it proper that he should do so, as the executors were trustees of this fund, and it was the evident intention of the grandfather to secure it for the benefit of his granddaughters. He said he could invest it to more advantage in Baltimore, where it would yield eight or ten per cent.; and he frequently repeated, in the course of the conversation, that he intended to settle the money on his wife, and for her exclusive use. Mrs. Stevenson was present during the conversation. Stevenson told witness that the executors wanted security, and he spoke of Mr. Reigart, his father-in-law, as the chief obstacle to his getting the legacy, and he expressed a great deal of surprise at the conduct of the executors, as he did not want the money for himself, but to invest it in Baltimore, where it would yield more and be less troublesome to him. Witness thinks that he saw Stevenson afterwards, and Stevenson told him that he had bought a house in Baltimore, near the circus, in the name and for the benefit of his wife. The defendant also proved * by Judge Dale, a competent witness, that some time in the fall of 1828, Stevenson came to Lancaster for his wife's legacy. Said Stevenson, and Dr. Samuel Dufresne, one of the executors of Dr. Albert Dufresne, came together to his office, and spoke to witness about it. Dr. Samuel Dufresne made two objections to paying over the money; the first was that Mrs. Stevenson was yet in her minority, and that the property was hers, and that her husband could not execute a valid release to the executors; the second was, that he himself was entitled to it on the contingency that she died without issue; but he said that he would waive both objections if Stevenson would invest the property for Mrs. Stevenson's use. Witness suggested a conveyance by Dr. Dufresne to Mrs. Stevenson, of real estate in Lancaster, but Stevenson said that he did not want real estate in Lancaster; that he would rather have it in money, and said that he could invest it to more advantage in Baltimore. Eventually, they partly came to the conclusion that one-half should be paid in real estate, and the other half in money. Witness remarked to Stevenson, that if he received one-half in cash, it would be a very pretty beginning, but he said that he did not want any of it for himself; that he was in business already. They finally came to this agreement, that one-half, consisting of real estate in Lancaster, should be transferred in trust, for the use of Mrs. Stevenson, and that the other half should be given to Stevenson, and that he should invest it for the use of his wife, in real estate in Baltimore. Witness told him it would be his interest, as it was his duty, to invest it for his wife, and he said it was what he wished, and what he intended to do. Stevenson at all times repeated that he did not want the money for his business, but to invest it in real property for his wife. He came again to Lancaster in the spring of 1829, and he said that he had obtained the opinion of two

of the ablest lawyers in Baltimore, that he was entitled to the legacies. Witness looked at the opinion, and read it over. Witness then told Mr. Stevenson, that by the laws of Pennsylvania, no person who was an executor, was required to pay over money, without a refunding bond and security. Witness * referred him to the

7 Act of Pennsylvania, of 21st March, 1772, entitled "An Act for the most easy recovery of legacies," and read it to him from the book of laws, and at said Stevenson's request, witness lent him the book, which he carried to the office of his counsel in Lancaster. He returned and said that he could not give the required security in Pennsylvania, but could do so in Maryland. Shortly after this, Dr. Samuel Dufresne came over to my office and said that Stevenson was pressing him for the money, and that he would do almost anything to get rid of the matter. Witness then went up to see Mr. Reed, the other executor, and told him that he thought Dr. Dufresne would give way, and Reed said, "zounds! the money shan't go out of my hands that way." During all this time, Stevenson said that he only wanted the money where it would be under his own eye, and of no more use to him. Reed came down to my office. It was finally agreed amongst them, that Dr. Samuel Dufresne should convey certain parcels of property in Lancaster, valued at \$9,000, to Mrs. Stevenson, for her use, and her use alone, and that the balance of the money, being \$10,520, or thereabouts, including the interest, should be paid to said Stevenson, to be by him invested in real property in Baltimore, for the use of his wife. Witness did not see the money paid, nor was he present when it was paid, but he prepared a release to the executors, which was executed both by Mr. and Mrs. Stevenson, and left in my hands, upon the understanding that it should be delivered over to the executors, upon the execution and delivery of the deed, for the real property in Lancaster. The reason why the deed was not executed and delivered at the time was, that Mrs. Stevenson made some objection to Mr. Reigart, as trustee, and said that it should remain until they returned to Baltimore, and that if they should make an arrangement, that some other person was to be inserted as trustee in the deed, and if not, then the deed was to be executed and delivered for the property, with Mr. Reigart's name as trustee. The deed was executed and delivered on the 22nd July, 1829.

8 * The defendants then offered in evidence the said deed, which is as follows, to wit:

It is agreed that the appellee may, at the argument of this case in the Court of Appeals, read as a part of the record in the above case, a copy of the deed of trust from Dufresne and others to Philip Reigart; and that an agreement, if any further one be necessary, will be signed on the part of the appellants, to annex the same to the record, as a part of the bill of exceptions in which it is called for. It is further agreed, that the record shall be made out and sent

up, without the actual introduction of said deed as a part of the evidence, a reference being made for its insertion in the place where it ought to be introduced.

The defendant further proved by said Judge Dale, that he considered the said deed as a literal execution of the agreement. The said witness on his cross-examination further stated, that the release was executed in the month of May, 1829, and that said Dr. Samuel Dufresne is dead, and that he died about ten years since. The defendant further proved by Franklin Reigart, a competent witness, that on the very day on which, as he understood the money was paid, and before the money was paid, there was some conversation at the dinner table between Stevenson and the father of the witness, in relation to said legacies. Stevenson said that he had a great deal of trouble with the executors, and he complained that they demanded a bond with securities in Lancaster. The father of witness then told Stevenson that he could easily get rid of the difficulty, if he would do what he ought to do. Stevenson said that he had promised the executors to invest it in property in Baltimore, in his wife's name, and that he intended to invest it in Baltimore in her name, and that would clear the executors, but they still demanded security. Witness went after dinner on that day with Stevenson, to see Schaum, whom Stevenson asked to be his security, but Mr. Schaum declined to be so, upon which Stevenson said to him, that he, Schaum, would run no risk, as he Stevenson had promised the executors that if they would pay him the money he would buy property in Baltimore for the * use of his wife. Stevenson contended in conversation with the father of witness, that he was not bound to take any real property, and his father told Stevenson that the executors only required him to conform with the will, and that by the will the legacy was given, so that neither the father nor the husbands of the granddaughters could touch it. They both were a little warm on the subject. Witness says that sometime in 1830, he was in Baltimore, and Stevenson there took him to a piece of property near the circus, where repairs were being made, and told him that that was the property he had purchased. The defendant was proved by Peter Reed, a competent witness, that he was one of the executors of Dr. Albert Dufresne. Witness knew Mr. Stevenson after his marriage, and says he had cause to know him, as he troubled him very much about the legacy. They tormented Dr. Dufresne, the other executor, almost to death, he was sickly and crabbed; but witness stuck out, and told Stevenson that he would not pay him unless the law required it. Witness asked Stevenson why he did not do as the will required. Witness told him that he should not have the money unless he acted according to the will. Stevenson tried to get security, but could not. He said he would buy property in Baltimore. Witness told him that the will called for the money to go to the separate use of the girl, and the bond

required was a bond to secure it to her separate use. Witness being cross-examined stated, that the bond required by the executors, was a bond according to the Act which Judge Dale, at the time of this conversation, read to Stevenson from the book. At the time of this conversation witness says, that one legacy had been paid to Stevenson in cash, and it was only about the other legacy that there was any dispute.

The plaintiff then further to maintain the issue on its part joined, proved by competent testimony that the said Josias Stevenson and the said Elizabeth L. Reigart were married on the 27th day of March, 1827. The plaintiff also offered in evidence the following
10 depositions taken in a former suit, and *to be received in this suit as evidence under the agreement which follows the said depositions:

MARYLAND, SCT: The State of Maryland to William Frick, John Mathiot, Edward Purcell and John R. Findlay, of Lancaster, State of Pennsylvania, greeting: Know that we have appointed you or any three or two of you, to be our commissioners to examine evidences, &c. Witness the honorable THEODORICK BLAND, Chancellor, this 2nd day of September, Anno Domini, 1833.

RAMSEY WATERS, Reg. Cur. Can.

Commissioners' oath, &c.

Depositions of witnesses produced, sworn or affirmed, and examined on the 15th February, 1834, at, &c., by virtue of a commission, &c. Dr. Samuel Dufresne, of, &c. deposeth as follows:

1. Do you know the complainant, and did you know Josias Stevenson, Junior, late of Baltimore City, deceased, in his life-time?

To the said first interrogatory he deposeth as follows: I do not know Henry Stevenson, the complainant, but I do know Elizabeth L. Stevenson and Philip Reigart, and I did know Josias Stevenson, Junior, late of the City of Baltimore, deceased, in his life-time,

2. Have you any knowledge of a legacy bequeathed to the said Elizabeth L. Stevenson, by her grandfather Albert Dufresne, of the City of Lancaster, in the State of Pennsylvania? If so, please state the amount thereof, and the circumstances by which the said legacy was attended, as regards the payment of it over, and annex to your answer an examined and authenticated copy of the last will and testament of the said Albert Dufresne, whereby said legacy was bestowed.

To the second interrogatory he deposeth as follows: By will, Dr. Albert Dufresne, late of, &c., deceased, dated the 8th of December, A. D. 1820, and duly proved on the 13th day of August, A. D. 1823, and letters testamentary thereupon issued to this affirmant and Peter Reed, two of the executors named in said will, the following bequest, amongst others, was made by the said testator in his last will and testament.

*2nd Item. I do give and bequeath unto my two grand-daughters, Elizabeth Reigart and Maria Reigart, the children of my late dearly beloved daughter, Albertina Reigart, deceased, late Albertina Dufresne, the sum of eighteen thousand dollars, that is to say, the sum of nine thousand dollars to each of my said grand-daughters, as and for their absolute property, which said sum is to be taken and set apart for that purpose, out of my personal estate, by the executors of this my last will and testament, and the guardians of said grand-daughters hereinafter named and appointed as soon as conveniently may be done after my decease, subject nevertheless, to the restrictions and limitations hereinafter mentioned and expressed. **11**

3rd Item. It is my will, and I do order and direct, that the aforesaid legacy or sum of eighteen thousand dollars, shall be understood and deemed as given and bequeathed unto them as their property respectively, and not either to their respective husbands, or to their father, Philip Reigart, nor their step-brothers, or step-sisters, in case they or either of my said grand-daughters, Elizabeth or Maria, should happen to die without leaving any child or children, and if either of them, the said Elizabeth or Maria, should die without leaving any child or children, then the whole of the said legacy, or sum, shall descend, come and belong, and I do hereby give and bequeath the same unto the survivor of them. But in case they should both die, without leaving any child or children, then and in such case I do give and bequeath the whole and every part of the said legacy or sum of eighteen thousand dollars unto my son Samuel Dufresne, or his legal heirs and representatives.

The amount of the legacies under said will to each of the grand-daughters of said testator, as directed in said item of the will hereinbefore particularly referred to by affirmant, was nine thousand dollars. Josias Stevenson, Junior, was here several times for the amount of the legacy claimed by him in the years 1828 and 1829. On the 25th of May, 1829, he, Josias Stevenson, Junior, obtained in money and property from the affirmant and Peter Reed, executors of the last will and testament of said Dr. Albert Dufresne, deceased, and from them as *guardians of the said Elizabeth and Maria, the two grand-daughters mentioned in the item of the will hereinbefore recited, the sum of nineteen thousand five hundred and twenty-six dollars and eight cents, in the manner hereinafter mentioned; the sum of nine thousand dollars, and the interest thereon was paid to the said Josias Stevenson, Junior, in cash, and the residue of the whole amount was paid by conveyance of real estate in the City of Lancaster, by deeds of trust, by which the property was to be held for the use of the said Elizabeth L. Stevenson. This real estate consists of three parcels, to wit, &c. **12**

The exact amount of cash paid to the said Josias Stevenson, Junior, the affirmant does not recollect; affirmant has not a distinct recollection of every circumstance connected with the payment of the legacy; affirmant recollects that Josias Stevenson, Junior, could not get the sureties required by the Act of Assembly, requiring sureties to be given to the executors as aforesaid; affirmant expressed his anxiety to Josias Stevenson, Junior, about securing the property to the said Elizabeth L. Stevenson; affirmant has no recollection of any promise made to him, that the money should be invested for her use, although he understood that such a promise had been made. He spoke to this affirmant, making known his intention to purchase some property in Baltimore. I think it was property near the circus that he spoke of. The time of this conversation affirmant does not exactly recollect. The exemplification of the will of Dr. Albert Dufresne, deceased, being endorsed, complainant's Exhibit A, I have carefully examined, with the original will now in the register's office in the City of Lancaster, and find the same exemplification to be a correct, accurate and literal copy of said original will.

3. Have you any knowledge of the payment over of said legacy; to whom made, and under what circumstances? If so, detail the same, fully and minutely, and state the time thereof,

To said third interrogatory deposeth as follows: affirmant states that he has not a full recollection of all the circumstances connected with the payment of the legacy to Josias Stevenson, Junior, but that
 13. as far as his knowledge and recollection * extended, he has detailed the same in his answer to the second interrogatory.

4. Do you know whether or not, previously to said payment, or at the time thereof, the said Josias Stevenson, Junior, on his part, expressly undertook and agreed to invest the amount of the said legacy in some property for the sole and separate use of the said Elizabeth L. Stevenson, and whether or not the said payment was not made to him upon his said undertaking and agreement, and at his solicitation? State all your knowledge of the matters enquired of, fully and in detail.

To the said fourth interrogatory he deposeth as follows: affirmant states that he has no other knowledge of any undertaking or agreement of the said Josias Stevenson, Junior, or any other circumstances connected with the payment of the legacy to him, other than that detailed in answer to the second interrogatory; said Josias Stevenson, Junior, did repeatedly solicit the payment of the legacy, and the delay arose from the anxiety of the executors and guardians to secure the interest of Elizabeth L. Stevenson; the legacy when paid as aforesaid, was paid by her consent; affirmant has not distinct recollection of any other matters enquired of in this interrogatory, than such, as he has detailed in his answer to the second interrogatory, and in his answer given to this interrogatory.

Benjamin Schaum, of the City of Lancaster, gentleman, aged twenty-seven years, or thereabouts, being produced, sworn and examined on behalf of the defendants, deposeth, as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: I do not know Henry Stevenson, the complainant, but I do know Elizabeth L. Stevenson and Philip Reigart, and did know Josias Stevenson, Junior, late of the City of Baltimore, deceased, in his life-time.

2. Same as before.

To said second interrogatory he deposeth as follows: Deponent has no other knowledge of the legacy bequeathed to Elizabeth L. Stevenson, by her grandfather Dr. Albert Dufresne, late of the City of Lancaster, deceased, nor the amount * thereof, nor any of 14 the circumstances connected with its being paid over, except that Josias Stevenson, Junior, called upon him in the City of Lancaster, to become one of his sureties in a refunding bond that he wished to give the executors of Albert Dufresne, deceased, for the purpose of enabling him to receive the legacy enquired of in this interrogatory. This deponent declined becoming his surety; that he wished him to get some other person; that he did not wish to have any thing to do with it. The exemplification of the will of Dr. Albert Dufresne, deceased, being endorsed complainant's exhibit A, I have carefully examined, with the original will now in the register's office in the City of Lancaster, and find the same exemplification to be a correct, accurate and literal copy of said original will.

3. Same as before.

To said third interrogatory he deposeth as follows: Deponent says that he has stated in his answer to the second interrogatory all his knowledge in reference to said legacy, and that he has no knowledge of any other circumstances, except such as are detailed in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no knowledge of any of the matters enquired of in this interrogatory, having detailed in his answer to the second interrogatory every circumstance of which he has any knowledge or recollection.

William Whiteside, Esquire, Register of the County of Lancaster, aged thirty-nine years, or thereabouts, being produced, sworn and examined on behalf of the defendants, deposeth as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: Deponent says that he neither knows the complainant nor respondents, nor did he know Josias Stevenson, Junior, in his life-time.

2. Same as before.

To said second interrogatory he deposeth as follows: Deponent has no knowledge of the legacy bequeathed to Elizabeth * L. or Stevenson, by her grandfather Albert Dufresne, deceased, 15

the amount thereof, nor the circumstances by which the said legacy was attended as regards the payment of it over, nor any other of the circumstances connected with same, except so far as deponent is informed by the exemplified copy of the will of the said Dr. Albert Dufresne, deceased, being endorsed complainant's exhibit A. Deponent is the Register of Wills of the County of Lancaster, and he has carefully compared and examined the exemplified copy, endorsed as aforesaid, with the original will of the said Dr. Albert Dufresne, deceased, now on file in his office, and he finds upon such examination and comparison, that the same is a true, accurate and literal copy of the said original will, on file as aforesaid.

3. Same as before.

To said third interrogatory, he deposes as follows: Deponent says that he has stated in his answer to the second interrogatory all his knowledge in reference to said legacy, and that he has no knowledge of any other circumstances, except such as are detailed in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no knowledge of any of the matters enquired of in this interrogatory, having detailed in his answer to the second interrogatory every circumstance of which he has any knowledge or recollection.

Samuel Dale, of, &c., deposeth as follows:

1. Same as before.

To said first interrogatory he deposeth as follows: I do not know Henry Stevenson, the complainant, but I do know Elizabeth L. Stevenson and Philip Reigart, the respondents, and I did know Josias Stevenson, Junior, late of the City of Baltimore, deceased, in his lifetime.

2. Same as before.

To second interrogatory he deposeth as follows: Deponent says that he has knowledge of the legacy bequeathed to Elizabeth L. Reigart, now Elizabeth L. Stevenson, by her grandfather Dr. Albert

16 Dufresne, late of, &c. Deponent says that * the amount due to Elizabeth L. Stevenson, after the death of her sister Maria, under the will of her grandfather Dr. Albert Dufresne, deceased, was \$18,000, and at the time it was settled in 1829, when the executors were released, the legacies, with their interests, were \$19,526.08. Deponent says some time in 1828, Josias Stevenson, Junior, came to the City of Lancaster, and demanded the legacy coming to his wife, under the will of her grandfather Dr. Albert Dufresne, deceased. Dr. Samuel Dufresne, one of the executors, agreed that he would give him the legacy coming to her, although she was under age, if he would take one-half of it in real property, for her use, and other half he would pay in cash. Some deeds were drawn by me, and executed by Dr. Samuel Dufresne to that effect, and sent on to him. He the

said Josias Stevenson, Junior, some time after, came to Lancaster, perhaps in 1829, the time I do not exactly recollect, and said he would be entitled to recover. Deponent says that Josias Stevenson, Junior, told him he could not obtain that security here, but could do it at home in Baltimore, and that he wondered why the executors should ask it of him. Deponent says he replied, that the executors were anxious to have the property secured to Elizabeth L. Stevenson. Deponent says that he Josias Stevenson, Junior, then replied, if he got the cash, he would apply the same in purchasing real property in the City of Baltimore for her, Elizabeth L. Stevenson's use, and that it could be as well secured there as in the City of Lancaster for her. Deponent says that Josias Stevenson, Junior, remained in the City of Lancaster at one time for about three days, during which time he frequently called at my office, and we had frequently conversations to the same effect, as to what is detailed above. He Josias Stevenson, Junior, borrowed the Acts of Assembly from me, in relation to the refunding bond; he said he would take them and consult his attorney in the City of Lancaster. He the said Josias Stevenson, Junior, finally agreed to take nearly the one-half in real property in the City of Lancaster, transferred for the use of his wife, and the balance in cash; and on the 25th day of May, 1829, he released and discharged the executors and guardians, to wit, Dr. Samuel * Dufresne and Peter Reed. Deponent has no recollection 17 of what took place when the money was paid, nor of any conversation that took place at that time. Deponent has examined the exemplified copy of the will of Dr. Albert Dufresne, deceased, being endorsed complainant's exhibit A, and believes it to be a correct copy.

3. Same as before.

To said third interrogatory he deposeth as follows: Deponent states that he has not a full recollection of all the circumstances connected with the payment of the legacy to Josias Stevenson, Junior, but that so far as his knowledge and recollection extends, he has detailed the same in his answer to the second interrogatory.

4. Same as before.

To said fourth interrogatory he deposeth as follows: Deponent states that he has no other knowledge of any undertaking or agreement of the said Josias Stevenson, Junior, or any other circumstances connected with the payment of the legacy to him, other than that detailed in answer to the second interrogatory. Said Josias Stevenson, Junior, did repeatedly solicit the payment of the legacy, and the delay arose from the anxiety of the executors and guardians to secure the interest of Elizabeth L. Stevenson. The legacy, when paid as aforesaid, was paid by her consent. Deponent has no distinct recollection of any other matter enquired of in this interrogatory than such as he has detailed in his answer to the second interrogatory, and in his answer given to this interrogatory.

The plaintiff then further proved, that the said Elizabeth L. Reigart, after the death of the said Josias Stevenson, Junior, and after letters of administration had been granted to her and the defendant, Philip Reigart, to wit, on the 15th April, 1837, presented to the Orphans' Court of Baltimore County, a claim against the estate of Josias Stevenson, Junior, an account of the said sum of money, by him so received, from the executors of the said Dr. Albert Dufresne, and for the purpose of showing the proceedings in said Orphans' Court, and the proceedings in the Court of Appeals, upon an appeal prosecuted * from the decision of the said Orphans' Court, in

18 relation to the claim so referred, the plaintiff offered in evidence the following record of a judgment of the Court of Appeals, in a case in which Henry Stevenson and others were appellants and Edward Shriver and Elizabeth L. Shriver, his wife, formerly Elizabeth L. Stevenson, were appellees, to wit, which record of the Court of Appeals is sufficiently stated in the opinion of this Court, for the purposes of this report.

The plaintiff proved further, that the said Elizabeth L. Stevenson, on the — day of —, in the year —, intermarried with the said Edward Shriver, and is now his wife.

All the foregoing evidence was received under an agreement of counsel made with the knowledge and assent of the Court, that the same should be and was received, subject to all objections as to its admissibility and competency, in like manner as if objection had been or was made to its admissibility, before the same was received, and that any opinion of the Court in regard to its competency, might be excepted to in like manner as if such opinions had been expressed upon objections made to the admissibility of the evidence before the same was given.

The defendant thereupon submitted the following prayer, to wit:

If the jury find from the evidence, that it was understood between Mrs. Stevensou (now Mrs. Shriver,) and her then husband J. Stevenson, Junior, and Reed, one of the executors of Dr. A. Dufresne, that if said executor and the other executor and guardian of Mrs. Stevenson, or either of them, would pay him over the legacy of \$18,000, without requiring of him personal security, that the same would be secured to the separate use of his said wife, that he the said Stevenson would invest the same in property in Baltimore, for such use; and if they further find, that he promised said parties to make such investment for the consideration aforesaid, and never claimed title to said legacy as of his own absolute property, or denied, but that the same should be held by him for his wife's use; and if they further find, that said Reed and Mrs. Stevenson, in consideration

19 only of said premises and undertaking of said J. Stevenson, * did agree and consent, and so inform him the said executor, Dr. S. Dufresne; and if they also find, that without advising said wife or said Reed, or said S. Dufresne, that he did not intend to

comply with said promise or undertaking, he said J. Stevenson received said legacy of \$18,000, in property in Lancaster, secured to the use of his said wife, and in money \$9,000, and added the balance thereof, or never told them or either of them, that he intended to hold said money in his own right, that then the jury are to allow defendants, Shriver and wife, a ratable dividend on the account against the estate of said J. S. Jr. out of the assets of said estate, given in evidence in this case; of which opinion the Court [PURVIANCE, A. J.] was, and so instructed the jury.

The plaintiff then, upon the evidence stated in the foregoing bill of exceptions, further prayed the Court as follows:

1. That according to the true construction of the will of Dr. Albert Dufresne, the legacy thereby bequeathed to Elizabeth Reigart, and the legacy thereby bequeathed to Maria Reigart, and which, upon her death, survived to Elizabeth, vested absolutely in her upon her marriage with Josias Stevenson, Junior.

2. That the said Josias Stevenson, Junior, by his marriage with the said Elizabeth Reigart, was, in virtue of his marital rights, entitled to demand and receive of the executors of Dr. Albert Dufresne, the bequests mentioned in the preceding prayer.

3. That the executors of Dr. Albert Dufresne had no right to hold or to invest the bequests mentioned in the preceding prayers, to the sole and separate use of the wife of the said Josias Stevenson, Junior.

4. That the executors of Dr. Albert Dufresne, could not lawfully require or exact of the said Josias Stevenson, Junior, after his said marriage, as a condition to the payment over to him of the said bequests mentioned in the preceding prayers, any stipulation, promise or agreement, that he would hold or invest the same for the sole and separate use and benefit of his wife.

5. That such portion of the bequests mentioned in the preceding prayers as was received by Josias Stevenson, Junior, after his marriage with the said Elizabeth L. Reigart, and during her coverture with him, and in virtue of his marital rights, became his absolute property, and that the claim now preferred against his estate by his widow, for money thus received by him, cannot be supported. **20**

6. That the decree of the Court of Appeals, passed at December Term, 1837, in the case of Henry Stevenson and others against Edward Shriver and Elizabeth Shriver his wife, is final and conclusive upon the parties to said cause, and that the claim advanced by the said Edward Shriver and wife in said cause, is not a lien or charge upon the estate of Josias Stevenson, Junior.

7. That no agreement made by Josias Stevenson, Junior, with Elizabeth L. Stevenson, his wife, or with any person for her, after his marriage with her, and in consideration thereof, to receive and hold to her separate use, or to receive and invest in property for her separate use, money that belonged to her in her own right, before

and at the time of said marriage, and upon which the marital right of the said Josias attached by said marriage, was or is binding upon the said Josias Stevenson, Junior, or his administrators, nor can such contract made as aforesaid be the foundation of any claim on the part of the said Elizabeth against the personal estate of the said Josias, since his death.

8. If the jury believe that he was bound to invest this property by the will of A. Dufresne, made any promise to invest the money received from the executors of A. Dufresne, that such promise was made under a mistake of law, and is not binding upon him.

9. If the jury believe that Josias Stevenson received of the executors of A. Dufresne, the money in question, and applied the same about his ordinary business, with the assent of his wife, and that neither the executors of said Dufresne, nor his wife, required its separate investment during his life-time, that then the said wife has no claim upon the estate for his money so received and used by said Stevenson.

21 *10. That there is no evidence to show a debt due to Shriver and wife, or either of them, from the estate of Josias Stevenson, Junior.

11. That Edward Shriver and Elizabeth L. Shriver his wife, late Elizabeth L. Stevenson, and widow of Josias Stevenson, Junior, cannot in right of the said Elizabeth L. Shriver, the administratrix of said Josias Stevenson, Junior, retain the amount of the claim produced in evidence in this cause, and sought to be established as a debt due to her from the estate of the said Josias Stevenson, Junior, or any part thereof, because the same is not passed by the Orphans' Court, and therefore, that the jury in marshaling the assets of the estate of the said Josias Stevenson, Junior, in this cause, cannot consider or treat the said claim as a debt due from the said estate.

12. That if the jury shall believe that the promise and agreement testified to by Reed and Reigart was made by the said Josias Stevenson, Junior; and shall also believe that the sum of money claimed by Edward Shriver and Elizabeth L. Shriver, his wife, was not paid to the said Josias Stevenson, Junior, under said agreement and promise, but if the jury find that a new agreement was made between said Stevenson and Dale, the attorney and agent of the executors, that said Stevenson should receive deeds of real estate in Lancaster, investing the half of the money in the hands of said executors in said real estate for the separate use of the wife of said Stevenson, and that the remaining half should be paid to him in cash, to be at his own disposal, then no debt was due to Shriver and wife for which defendants can claim a deduction in marshaling the assets in this case.

13. That there is no evidence in this case to show that Josias Stevenson, either at the time, or after he consented to the investment of a portion of his wife's legacy in real estate in the City of Lancaster,

for her separate use, promised the executors of Dr. Albert Dufresne, or Samuel Dale, or his said wife, that he would invest the balance of said legacy upon its being paid to him in property for her use, or that he would in any manner hold it for her use.

* 14. If the jury find from the evidence, that Josias Stevenson, Junior, consented that one-half or about half of the legacy given his wife by the will of Dr. Albert Dufresne, should be invested in real estate for her sole use, he, the said Josias, was under no legal, moral, or equitable obligation, to make any further provision for the sole use of his said wife out of the balance of the said legacy. **22**

15. That if the jury believe from the evidence, that Josias Stevenson, Junior, gave his consent that one-half or about half of the legacy given his wife by the will of Dr. Albert Dufresne should be invested in real estate for her sole and separate use, and if they further believe, that at or after the time of giving such consent, he promised the executors of Dr. Albert Dufresne, to invest the balance of said legacy upon its being paid to him in cash for the sole and separate use of his said wife, that such promise was without consideration, and not binding upon him in law.

16. If the jury believe that Josias Stevenson made the promise mentioned in the testimony of Reed and Reigart, to invest the legacies of his wife for her sole use; and if they further believe that such promise was made upon the condition that the whole amount of said legacies should be paid to him; and if they find that this condition was not complied with, but that near half the amount of said legacies was invested by the executors of Dr. Albert Dufresne in real estate, and that the balance only was paid to said Stevenson in cash, that then the said promise was not binding on him, and no claim founded upon it can be a charge against his estate.

17. If the jury believe from the evidence, that Mrs. Stevenson was present with her husband, in Lancaster, when he demanded the legacy willed to her by Dr. Albert Dufresne, from his executors; and was also present when the portion of said legacy which her said husband received in cash was paid to him, and that she did not demand of him or of the executors, that such portion or any part of it should be invested or held for her sole use, but gave her free consent to the said payment to her said husband without condition or qualification, * then the defendant cannot set up by way of claim on his estate the amount of money so paid him with interest. **23**

18. The plaintiff prays the Court to instruct the jury, that if they shall believe from the evidence in the cause that the executors of the said Dr. Albert Dufresne, after the intermarriage of the said Elizabeth L. Reigart with the said Josias Stevenson, Junior, and during the life-time of the said Josias Stevenson, Junior, and with the consent of the said Josias Stevenson, Jr., conveyed certain real estate in the City of Lancaster, by deeds of trust, for the sole and separate use of the said Elizabeth L. Stevenson, to the value of one-half, or about

one-half of the said legacies mentioned in the preceding prayers; and at the same time, or about the same time, paid to the said Josias Stevenson, Junior, in cash, the whole residue of said legacies, in full payment and discharge of the said legacies; and shall further believe from the evidence in the cause, that at the time of such payment, in cash, to the said Josias Stevenson, Junior, he the said Josias Stevenson, Junior, as an act contemporaneous with such receipt of the said money, and as part of the *res gestæ*, executed and delivered to the said executors, a receipt, in writing, in nature of a deed of release in respect of such legacies, and that the same deed of release was then and there accepted and received by the said executors; and shall further believe, that no other receipt, release or other instrument of writing whatever, was then, or at any other time, either before or afterwards, executed and signed by the said Josias Stevenson, Junior, or written by him or by his direction, in respect of the said sum, so by him received, or in respect of his said legacies, then the said deed or release is the best evidence of the capacity in which the said Josias Stevenson, Junior, received the said amount, and of the trust, if any, on which he received the same, and that parol evidence cannot be received of its contents, without shewing said deed of release to be lost, or otherwise accounting for its non-production.

19. That limitation is a bar to the claim of Elizabeth Stevenson, as respects the claim of the plaintiffs in this case.

24 *The Court [PURVIANCE, A. J.] refused to grant the said prayers, or any of them, but rejected the same, and each and every of them; to which refusal of the Court to grant the said several prayers, and to the refusal of the Court in respect of each several prayer, and to grant such several prayer, the plaintiff excepted.

The parties filed the following agreement, to wit:

It is agreed that the record in this case shall be considered as made out in full, although the record does not contain at length the record in the case of Urath Stevenson against the administrator of Josias Stevenson, Junior, *fi. fa.* thereon, and sheriff's return of *nulla bona*; it being agreed, in order to facilitate the making up of the record, and to save expense, that the short copy should have the same effect in the argument of the case as if the full record had been introduced; the short copy having by agreement been substituted in the place of the record in full. It is also agreed, that in the record of the case of *Henry Stevenson and others, appellants vs. Edward Shriver and Elizabeth L. his wife, formerly Elizabeth L. Stevenson*, shall be considered as included in the record in this case, without actual insertion; it being agreed that the same may be read in the argument of this case as a part of the record, from the record thereof in the Court of Appeals, or from the printed report thereof.

Both parties appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

McMahon, Speed and R. Johnson, for the appellant, plaintiff below.
W. Schley, for the appellee, defendant below.

STEPHEN, J. delivered the opinion of this Court. The question involved in this case being one of some novelty in point of principle, and the amount of the property * depending upon the decision of it being of considerable value, and therefore materially 25 affecting the interests of the parties litigant, it has received, as it demanded, the careful and deliberate consideration of this Court. The case has been ably and ingeniously argued by the counsel engaged for the respective parties, and much aid has been derived during our researches, from the light thrown upon it by the discussion at the bar. Upon the fullest examination we have been able to bestow upon it, we have come to the conclusion that there is no error in the decision of the Court below, and that the judgment there rendered ought to be affirmed. In deciding upon the merits of this controversy, we think that the true construction of the will of the testator in reference to the character of the legacy given to his granddaughter, Mrs. Stevenson, that is, whether it was absolute, or for her separate use, is wholly immaterial and irrelevant, and that the rights of the parties must depend upon the validity or invalidity of the agreement, under or in virtue of which it was paid over to her husband. Under this aspect of the case, many of the prayers made by the appellants' counsel in the Court below, which kept out of view the operation and effect of that agreement, were wholly abstract, and did not involve the true point in controversy between the parties, and therefore received at the hands of the Court that fate, which upon established legal principles, unavoidably awaited them, it being the undoubted duty of the Court not to wander or suffer themselves to be led into the wide and extended fields of legal science, for the purpose of solving or settling legal principles having no relevancy to the case, before them, but to confine themselves to those questions of law alone, which arise upon the facts and circumstances established by the testimony, and which properly belong to the case before them. The great and leading question therefore in this case seems to be, whether the agreement made by the husband of Mrs. Stevenson with the executors of her grandfather's will, if satisfactorily proved to have existed, was founded upon a sufficient consideration to render it obligatory upon him, so as upon the non-fulfilment of it on his part, to create the relation * of debtor and creditor between 26 him and his wife. We cannot entertain a doubt of the sufficiency of the consideration to support his promise to the executors, in reliance upon which they paid him the legacy. If it was founded upon an equitable duty, such as would be enforced by a Court of equity, that alone seems to be sufficient to give it efficacy, and bind-

ing operation, even in a Court of law. In *Cowper's Rep.* 290, Lord Mansfield says, "where a man is under a moral obligation which no Court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promises to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a man, after he comes of age, promises to pay a meritorious debt, contracted during his minority, but not for necessities; or if a bankrupt in affluent circumstances, after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the Statute of Frauds. In such and many other instances, though the promise gives a compulsory remedy, where there was none before either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration;" and Buller, Justice, in his opinion says, "the true rule is, that wherever a defendant is liable in equity and conscience to pay, that is a sufficient consideration;" and he says that the rule, that to constitute a valid consideration for a promise, there must be a benefit to the promisor or loss to the promisee, is much too narrow. The executors in this case held the wife's legacy as trustees, and whenever it is necessary for a husband to resort to a Court of equity to get possession of his wife's legacy, that Court will require him to do equity, by making a settlement upon his wife and children, before it will lend him its aid in the recovery of it. This is considered to be an equitable duty on his part, and formed, we think, a sufficient consideration for his promise in this case. The waiver moreover on the part of the executors of the refunding bond, which it appears by the laws of Pennsylvania they had a right to require, formed an additional consideration

27 * for the agreement on the part of the husband for the benefit of his wife. It is also to be considered in the decision of this controversy, that according to the proof, the husband received the money of his wife, not in virtue of his marital rights, so as to amount to a reduction of the legacy into possession, but as her trustee and for her benefit; on the death of the husband therefore, it continued to be her property, for which she had a claim against his estate, and did not go to his personal representatives. On this point the authorities hold a language uniform, explicit and unequivocal,

The agreement then being valid and obligatory upon the husband, is to be considered as a substitution for the equity of the wife, which operated for the benefit of the wife and children, though not named, and which a Court of equity would specifically execute against the husband, upon a bill filed for that purpose. In support of this doctrine, see the case of the *Attorney-General vs. Whorwood*, where Lord Hardwick recognizes the validity of an agreement made by a husband with a trustee, for the purpose of obtaining his wife's money out of his hands, which the trustee had received upon the sale of her

father's estate, and decreed an execution of the agreement, on the death of the husband, against his representatives. The agreement was, to invest the money in the purchase of land, to be settled for her benefit for life, and if there were no children, then on himself. In that case his lordship said "that it had been truly insisted, on behalf of the wife, that on the husband's application for the money, the Court would undoubtedly have ordered a further settlement." If then the parties did not come into Court, but acted among themselves, and the husband had agreed to do that which the Court would have directed, had the wife insisted on it in a proper suit, it should have its full effect. It has been solemnly settled by this Court, and has also been decided by Chancellor Kent, in New York, that the wife's equity will prevail against an assignment of the husband for valuable consideration or in payment of a just debt. See 4 *G. & J.* 282; 5 *John. C. Rep.* 484, where Chancellor Kent also decides, that the Court may, in its discretion, * give the whole or part only of the property to the wife according to the circumstances of the case; to same effect, see 6 *John. C. Rep.* 178. 28

If we are correct in the views which we have taken, as to the binding and operative effect of the agreement of the husband in this case, the next question which arises is, did his failure to invest according to the terms and conditions under which he received the legacy, give to his wife the right to elect to consider him her debtor to the amount of it, as so much money had and received to her use? Upon principle, and authority, we think it did give her that right. He received the money upon a special trust and confidence, that it would be invested for her benefit; he received it as her trustee; and upon his failure to make that investment, the consideration upon which he received it failed, and she had a right to consider it as so much money had and received for her use. See 1 *H. & G.* 258, where it is said, "if one man takes another's money to do a thing, and refuses to do it, it is a fraud; and if it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received for his use." The action for money had and received is an equitable action, and equally as remedial in its effects as a bill in equity. In *Moses vs. Macfarlan*, 2 *Burr.* 1012, Lord Mansfield says, "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." There can be no doubt that the wife may be a creditor against her husband's estate, after his death. 1 *H. & G.* 280; *Powell on Contracts*, 109; 3 *P. Will.* 335; 1 *Vernon*, 427. These last cases, it is true, were cases in equity, and there were no creditors to contend with, but they shew that as between husband and wife the relation of debtor and creditor may exist; and in the case in *Vernon*, the wife was administratrix of her husband, and was permitted to

retain for her claim out of his assets. But whether the debt be legal or equitable, this Court have decided, *it is equally within

29 the power and jurisdiction of the Orphans' Court to allow it. In this case, however, for the reasons already given, we think the claim of the wife supported by such considerations as constitutes it a debt recoverable in a Court of law. We do not think that the decision of this Court, reversing the decision of the Orphans' Court allowing the claim, can operate to bar the recovery, it being the exercise of an appellate jurisdiction, reviewing the order of an inferior Court, possessing in reference to the subject before it, a *prima facie* jurisdiction only. As to the objection, that the executors transcended their powers in demanding the execution of the agreement, before they would consent to pay over the money to the husband, we think that it is entitled to no consideration. The agreement having been entered into by the husband, with a full knowledge of all the facts, without fraud or surprise, and being founded upon a valid consideration, cannot be otherwise than obligatory. It seems, however, that the executors may interfere to protect the wife's equity; for in *5 John. C. Rep.* 473, Chancellor Kent refers to a case where it appears the bill was filed by the executor of the testator, to stay the husband who had instituted a suit in the Spiritual Court for his wife's legacy. Lord Mansfield said, it made no difference who was plaintiff in equity, and he directed that the money should be disposed of for the benefit of the wife. We do not think that the husband can shelter himself under a mistake of the law; he not only appears to have taken legal advice upon the subject of his marital rights, in relation to the legacy, but if he had not, there is, we think, nothing in this case to except it out of the operation of the general rule, that ignorance of the law cannot be made available with a full knowledge of all the facts. The case of *Bowley and Lammott* was decided upon a principle wholly inapplicable to this case. That was a case where a forfeiture of title would have been incurred, if the general rule, that a knowledge of the law in civil cases shall be presumed, where there is a full knowledge of the facts, had been permitted to operate; it was to charge the party with a fraudulent concealment of title, in

30 the absence of actual *knowledge, upon the legal presumption, which imputed knowledge. In that case, the application of such a principle was looked upon as being too monstrous and unjust, to receive for a moment the countenance or sanction of the Court; it was a doctrine most glaringly unjust, and alike repudiated by the rules of morality, a refined sense of justice, and the principles of law. It was therefore rejected. We think there is nothing in the objection, that the claim of the wife against her husband's estate had not been allowed by the Orphans' Court; the decision of that Court, whether favorable or unfavorable, not having a conclusive effect upon the question, when submitted to a Court of law for adjudication.

We believe we have now taken a view of all the questions involved in the prayers made by the respective parties in the Court below, and upon the best consideration we have been able to give to the subject, we approve of the judgment of that tribunal, and think it ought to be affirmed.

The first, second, third and fifth prayers made to the Court below by the counsel for the plaintiff, were properly rejected, as being mere abstract legal propositions, putting the agreement entirely out of view, upon which the defendant rests her claim to retain.

The fourth, we think, was properly rejected for the reasons before expressed.

The sixth prayer, as to the binding effect of the decision of the Court of Appeals, in the case of the appeal from the Orphans' Court, was properly rejected for the reasons already given. The effect of the agreement, as now proved, not being in the view of that Court when the decision was made.

The seventh prayer was, we think, also properly rejected; for the reasons already given, we think the agreement was a valid one, and supported by an adequate consideration.

The eighth prayer, founded on a mistake of law, for the reasons already assigned, was likewise properly rejected.

The ninth prayer was also properly rejected; under the agreement it was his duty to invest; no laches is imputable to the wife or executor, so as to create a forfeiture: if a *delusion existed, it sprung from his bad faith, he having always declared his intention to be, to make the investment according to contract. 31

The tenth prayer was also properly rejected, for the reasons already given. The proposition contained in this prayer was too untenable to receive for a moment the sanction of the Court, that is, that the claim of the wife was totally destitute of evidence to support it.

The Court, we think, were right in rejecting the eleventh prayer, for the reasons already given; the claim, we think, did not require the sanction of the Orphans' Court.

The Court, we think, were right in rejecting the twelfth prayer, there being no evidence in the case to sustain it.

The Court were clearly right in rejecting the thirteenth prayer; there was evidence sufficient to go to the jury to prove such promise.

The Court were right in rejecting the fourteenth prayer, for the reasons before stated.

The Court were right in rejecting the fifteenth prayer, for reasons which have been already stated; there was a sufficient consideration to sustain the promise.

The Court were right in rejecting the sixteenth prayer, there being no evidence to warrant it.

For reasons already given, the Court were right in rejecting the seventeenth prayer; if the agreement was a valid one, her consent

when the money was paid under it, would not annul or vacate it. She was entitled to the benefit of it, and her consenting to the payment of the money when it was paid, without at that time annexing any conditions or qualifications to such payment, would not deprive her of the benefit of that agreement. No stipulation on her part was necessary for the protection of her interest. She had a right to rely upon and claim the benefit of the contract which had been made by the executors for her use.

The Court were also right in rejecting the eighteenth prayer. The release had nothing to do with the agreement; the agreement having been made, the release was made to *discharge the executors, it was only collateral to the agreement. The prayer was clearly not warranted by the proof, and was, therefore, properly rejected.

The nineteenth prayer was properly rejected. Mrs. Stevenson being one of the personal representatives of her husband, could institute no suit against herself, at law; the Act of Limitations, therefore did not apply to the case, and created no bar to the recovery of her claim.

The Court were right in granting the defendant's prayer; the record containing sufficient evidence to warrant the jury in finding the facts upon which it was predicated. The judgment of the Court below is affirmed.

Judgment affirmed.

PATRICK O'REILLY vs. GILBERT MURDOCH.—June, 1843.

The Act of 1791, ch. 68, gives jurisdiction to Justices of the Peace, where the real debt and damages do not exceed ten pounds, current money, or one thousand pounds of tobacco.

The Act of 1809, ch. 76, gives jurisdiction to the Justices of the Peace, in all cases where the real debt and damages doth not exceed the sum of fifty dollars.

Both these Acts, in defining jurisdiction, refer not to the sum claimed, but to the sum recovered, as the standard by which it was to be regulated.

By the Act of 1813, ch. 162, the sphere of the justices' power was extended to trespasses upon real property, by cutting, destroying or carrying away timber or wood from off any land where the damage should not exceed the sum of fifty dollars. The test of jurisdiction here also is the sum recovered.

By the Act of 1824, ch. 138, jurisdiction is given to the justice to injuries over real property, for which *t. q. c. f.* might be maintained, and where the damages "laid or claimed" should not exceed fifty dollars.

The Act of 1825, ch. 51, extends the jurisdiction of justices to trespasses of either real or personal property, where the damages claimed or laid shall not exceed the sum of fifty dollars.

The Act of 1834, ch. 296, gives jurisdiction to Justices of the Peace, in all cases where the debt or damages "laid or claimed" shall not exceed the sum of fifty dollars, excepting from the operation of that Act, actions of

slander, assault and battery, and where titles to land shall come in question.

The Act of 1824 first introduced a new test of jurisdiction, by making it to * depend upon the damages claimed or laid, and from that time all subsequent laws providing for the recovery of damages, have adopted the same standard. **33**

If a plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the County Court is not taken away.

These views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions for torts. (a)

In an action against an innkeeper, for negligently taking care of the plaintiff's horse in his stable, so that he was killed, the damages claimed exceeded fifty dollars. *Held*, that the County Court had jurisdiction of the action.

Where, in the progress of a trial, the defendant excepted to instructions granted in favor of the plaintiff, and afterwards the judgment was arrested, but upon the appeal of the plaintiff, reversed, this Court will not enter final judgment, but remand the cause for judgment on the verdict to the County Court, in order that the defendant may have an opportunity of appealing from the instruction given against him.

APPEAL from Anne Arundel County Court. This was an action of trespass upon the case, brought by the appellant against the appellee, on the 16th April, 1841. The plaintiff declared for that whereas, according to the customs and laws of this State, all innkeepers who keep common inns to entertain travellers, and cattle of travellers, upon the roads where such inns are kept, and who put up at, and set up their horses, &c., in the same, are bound to keep the cattle, goods and chattels of such travellers, both by day and night, being within those inns, without detriment, damage, diminution or loss, so that no hurt, detriment or damage whatsoever, shall happen to the said guests, or to their cattle, goods or chattels, or any part thereof, through the default or carelessness of the said innkeepers or their servants; and whereas, the said defendant, on the 28th October, 1840, and before, kept, and from thence hitherto hath kept and still keeps, as master thereof, a certain common inn, at the City of Annapolis, in the said county, commonly called or known by the name of the Farmers' Inn; and while the defendant so kept, as mas-

(a) Cited in *Ott vs. Dill*, 7 Md. 255; *Abbott vs. Gatch*, 13 Md. 336; *Bushey vs. Culler*, 26 Md. 552. The test whether a Court has jurisdiction in actions *ex contractu* is the amount recovered, and not the sum laid or claimed. *Rohr vs. Anderson*, 51 Md. 206. Under the Constitution of 1867, the minimum limit of the jurisdiction of the common law Courts of record of Baltimore City, must exceed one hundred dollars; and if the amount recovered in an action *ex contractu* does not exceed that amount, there is a want of jurisdiction to render a judgment. *Ibid.* Cf. *Beall vs. Black*, post m. p. 208.

ter thereof, the said inn, to wit, on the day and year aforesaid, the said plaintiff, travelling along and by the place where the said inn then was and stood, with a mare of the said plaintiff, then and there

34 * stopped at the said inn, and brought the said mare into the said inn, and set up the said mare at and in the said inn, and left and lodged the said mare therein, for the said mare to be there baited, entertained, guested and fed, and taken good care of therein, as in a common and public inn until the same should be called for again by the said plaintiff for hire and reward, as used and customary in such inns to be paid to the said defendant, for the standing, lodging, baiting, entertaining, guesting, feeding and taking care of the said mare, at and in the said inn; yet the said plaintiff through the default, neglect and mere carelessness of himself and his servants, in this behalf, while the said mare so remained and continued at and in the said inn, for the purpose and on the cause aforesaid, to wit, on the same day and year aforesaid, at the city aforesaid, in the county aforesaid, so badly, carelessly and negligently took care of the said mare, that during that time, to wit, on the same day and year aforesaid, at the county aforesaid, the said mare, of the price of one hundred and thirty dollars, was in the said inn, through the mere default of care and neglect of the said defendant and his said servants, killed, by having her neck broken, either by the said Gilbert or some of his servants, or some other person or persons unknown to the said plaintiff, so that the said mare on the same day and year aforesaid, at the city and county aforesaid, died, whereby the said plaintiff saith he is injured, and hath damage to the value of three hundred dollars, current money, and therefore he brings his suit, &c.

The defendant pleaded *non cul*: upon which issue was joined. The jury assessed the plaintiff's damages at \$47.50. But because the damages did not exceed \$50, the County Court arrested the judgment, and the plaintiff appealed.

At the trial of this cause, the plaintiff to sustain the issue joined on his part, proved to the jury by a competent witness, that the plaintiff on some day in the month of October eighteen hundred and forty, rode on horseback with the witness to the City of Annapolis, and as witness believes, turned into defendant's yard, the said defendant being an inn-keeper regularly licensed; and by another

35 witness that in the month of October, * eighteen hundred and forty, he having several horses in defendant's stable, he went into the stable with the hostler at ten or eleven o'clock at night, and there found everything right; that the next day at day-break, or thereabouts, the hostler informed him that a horse in the stable was hung, and that going into the stable he found a horse which he afterwards was told by defendant was plaintiff's, dead, and that it came to its death by pressing its head through a hole between its stall and the adjacent stall, which hole deponent believed was broken by the horse in one or other of the stalls. The deponent also stated,

that he had several horses at the stable for several days, and that they were well taken care of by the hostler, and that the stalls in defendant's stable were in good condition, as well as could be found elsewhere; and by a third witness the said plaintiff proved, that the witness was hostler to the defendant in the month of October eighteen hundred and forty, and that finding the horse for which this action is brought, in the defendant's stable yard, he took it into the stable and there kept it well for several days, during all which time he enquired of defendant and others about the premises for the owner of the horse, but without discovering him; and that he did not discover who was the owner until after the horse was dead; that on the night on which the horse died, he was in the stable at ten or eleven o'clock at night, and found every thing was right; that before day-light on the succeeding day he was again in the stable, when he discovered that the horse in question was dead, and that it came by its death by pressing its head through a hole between its stall and the adjacent stall, which hole was made by breaking off a part of the plank between the two stalls, which was done either by the horse in question, or horse in the adjacent stall; that the stalls in the defendant's stables were in good condition, and that as fast as any accident happened to any of them it was repaired.

Whereupon the plaintiff by his counsel prayed the Court to instruct the jury:

* That if the jury should be of opinion from the evidence, 36
that the horse of the plaintiff was in the stable of the defendant as inn-keeper, and was there killed, the plaintiff is entitled to recover damages for such loss, without proof that his death was the consequence of a want of care on the part of the defendant or his servants.

Whereupon the Court [DORSEY, C. J. and BREWER, A. J.,] instructed the jury, that if they should be of opinion from the evidence, that the horse of the plaintiff was in the stable of the defendant as a public inn-keeper, and was there killed, the plaintiff is entitled to recover damages for such loss, without proof by him that his death was the consequence of a want of care on the part of the defendant or servant, and that to prevent a recovery in such a case where it did not appear by the proof of the plaintiff, whether the horse was killed by reason of the negligence or want of proper care on the part of the defendant or his servants, or not, the defendant must make it appear to the jury that the horse was not killed by reason of the want of such care on the part of the defendant or his servants. The defendant excepted.

The appeal was argued before BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

Boyle, and A. C. Magruder, for the appellant.

T. S. Alexander, for the appellee.

STEPHEN, J. delivered the opinion of this Court. The matter in controversy in this case is of small amount, but the question involved is one of considerable importance in the administration of civil justice. It is a question of jurisdiction, and can only be decided by a careful examination of the various Acts of Assembly conferring power upon single magistrates or justices of the peace, in the recovery of small debts and other matters submitted to their judicial cognizance. The decision of such questions is not free from difficulty, on account of the multiplicity and mutability of the legislation by which our code of laws is characterized upon such subjects;

37 * but after the best consideration we have been able to give to the case before us, we have come to the conclusion that there was error in the judgment of the Court below, and that the same ought to be reversed. Until within a recent period of our judicial history, the jurisdiction of the County Court was clear and indubitable; and we do not think, that upon a fair construction of the laws enlarging the jurisdiction of justices of the peace, it has been ousted or taken away. And the opinion we have been induced to adopt, derives no inconsiderable sanction from the very marked and striking change of phraseology in which the several Acts of Assembly have been couched, that have from time to time been passed upon the subject; some of which seem to look to the fruits of the judgment or the sum recovered, and others to the matter or thing put in demand, as the test of jurisdiction. It is alone by keeping in view this distinctive feature of the laws, fixing the boundaries of jurisdiction between the Courts of law, and justices of the peace, that a correct or satisfactory result can be arrived at. The Act of 1791, ch. 68, gives jurisdiction to justices of the peace, where "the real debt and damages doth not exceed ten pounds, current money, or one thousand pounds of tobacco." By the Act of 1809, ch. 76, the jurisdiction is given "in all cases where the real debt and damages doth not exceed the sum of fifty dollars," but the only enlargement of jurisdiction conferred by this Act, is confined to the sum, and has no reference to the subject-matter of the controversy, further than the amount of the sum involved in the litigation. The Act expressly provides that judgment shall be given "according to the laws of the land and the equity and right of the matter, in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do, when the debt and damages do not exceed the sum of ten pounds, current money." Both these laws, in defining the jurisdiction, expressly and manifestly refer, not to the sum claimed or put in demand, but to the sum recovered, as the standard by which it was to be regulated. By an Act passed in the year 1813, ch. 162, the sphere * of the judicial power of justices of the peace was extended to trespasses upon real property, by cutting, destroying or carrying away timber or wood from off any land,

where the damage should not exceed the sum of fifty dollars. Here too it is to be remarked, that the jurisdiction is to be tested, not by the damages claimed or demanded, but by the sum recovered; the language of the Act being, "where such damage doth not exceed the sum of fifty dollars," which manifestly imports the amount of the injury, actually sustained, and not the estimate which the party himself may make of it. By an Act passed in 1824, ch. 138, jurisdiction is given to redress any injury to real property, for which an action of trespass *quare clausum fregit* might be maintained, where the damages claimed or laid should not exceed the sum of fifty dollars.

Here, for the first time, the rule fixing the jurisdiction, is changed, from the amount recovered, by the judgment of the magistrate, to the damage as laid or claimed by the party to the suit, and the jurisdiction of the County Courts is expressly taken away in all such cases. By an Act passed in 1825, ch. 51, the jurisdiction of justices is extended to trespasses either to real or personal property, where the damages claimed or laid shall not exceed the sum of fifty dollars, and the power of the County Courts to adjudicate or hold plea of such cases is also taken away. By the Act of 1834, ch. 296, jurisdiction is given to justices of the peace in all cases where the debt or damages laid or claimed, shall not exceed the sum of fifty dollars, excepting from the operation of that Act, actions of slander, assault and battery, and actions where the title to lands shall come in question. By section 10 of the Act of 1791, the provisions of that Act are restricted to debts or sums of money or tobacco due on contract, and to damages for the non-delivery of grain or other articles, contracted to be delivered. In that respect, no change is made by the Act of 1801. By the Act of 1813, jurisdiction is first given in cases of trespass, and is founded upon the sum recovered. The Act of 1824 first introduces a new test of jurisdiction, by making it to depend upon the damages claimed or laid; and from that time all subsequent laws * providing for the recovery of damages, have adopted the same standard, founding the jurisdiction not upon
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the sum recovered, but upon the amount put in demand. If the plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the County Courts, existing prior to the passage of the several Acts of Assembly, is not taken away, but remains perfect and unimpaired. In cases of *tort*, sounding in damages, such as the one before this Court, it is not perceived what other rule could well be adopted. In the language of Judge Chase, in 3 *Dallas*, 407, "it must be acknowledged, that in actions of *tort* or trespass from the nature of the suits, the damages laid in the declaration afford the only practicable test of the value of the controversy;" and Chief Justice Elsworth, in the same case

says, "in an action of trespass or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction." "The proposition then is simply this: where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." In drawing the line of partition, between the jurisdiction of justices of the peace, and the County Courts, the Legislature of this State seem to have been governed by similar considerations, and in all cases of *tort* have made the jurisdiction to depend, not upon the sum recovered, but upon the damages demanded. If the injury sustained may be redressed by a sum not exceeding fifty dollars, and the plaintiff is willing to limit his right of recovery to that amount, jurisdiction is given to a justice of the peace to decide upon his case; but if he desires an indemnity, in the form of damages, to a larger amount, the County Courts * are not divested of their original jurisdiction, and remain the appropriate tribunal to afford him redress; these views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions of *tort*, where the amount of the damages are peculiarly a subject for the consideration of the jury.

After this opinion, *Alexander*, for the appellee, moved the Court that no judgment ought to be entered in this case, but the judgment of the County Court being reversed, writ of *procedendo* ought to be awarded to the County Court, in order that such proceedings may be had, as would enable the appellee, the defendant below, to obtain the judgment of this Court on the question reserved in the bill of exceptions, and insisted:

1. That his motion is sustained by the decision of this Court in the case of *The State, use of Charlotte Hall School vs. Greenwell*, 4 G. & J. 419.

2. That independent of said decision, it would be necessary for the purposes of justice, that the case be sent back, in order that it may be put in a condition to enable this Court to pass upon the correctness of the instruction by the Court below to the jury.

BY THE COURT—

Judgment reversed, and procedendo awarded.

41 * ROBERT GORDON vs. JAMES M. DOWNEY.—June, 1843.

By the Act of 1829, ch. 51, Rev. Code, Art. 64, sec. 41, any assignee, *bona fide* entitled to any judgment, bond, specialty or other chose in action for

the payment of money, by assignment in writing, signed by the person authorized to make the same, may by virtue of such assignment sue and maintain an action, &c. in his name, &c. against, &c. *Held*, that an instrument of writing which bound the defendant to pay a money rent, let a third party have a portion of the produce of the demised premises, and furnish the means of carrying it away, was not such an instrument, as under that Act, would authorize an assignee to maintain an action in his own name.

The *chose in action* contemplated by the Act of 1829, ch. 51, was one purely for the payment of money; and where the assignor if no assignment had been made, could only maintain an action for non-payment of the money. (a)

But where money is due under such a contract, and the defendant promises the assignee to pay the same, this will enable the assignee so sue independent of the Act of 1829, ch. 51, upon the express promise.

Where a verdict is rendered for the plaintiff on two counts in a declaration, one of which contains no cause of action, the Court will render judgment upon the other if legally sufficient.

The Act of 1809, ch. 153, declares that judgment shall not be stayed after verdict for defect of any count in a declaration, where there is one good count.

Where the plaintiff counts upon a contract assigned to him, followed by an express promise by the defendant to pay him the sum alleged to be due under it, and the bill of exceptions does not show that the plaintiff had closed the testimony on his part, it is error in the Court, upon the motion of the defendant, to reject the proof of the assigned contract.

In virtue of the Act of 1831, ch. 319, this Court is required in appeals from certain County Courts enumerated in that Act, to decide upon all the bills of exception taken at the trial below, whether appealed from or not.

Where the County Court awards a new trial, it has power to authorize an amendment of the pleadings under the Act of 1785, ch. 80, sec. 4.

Where a verdict is set aside and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had been had.

An application for an amendment of pleadings is not a demand of a matter of right, but is an appeal to the sound discretion of the Court, and to be granted when it shall appear necessary to bring the merits of the question between the parties fairly to trial. (b)

Where an application is made to the Court to withdraw a general issue plea, and file a general demurrer, and the defendant's exception to a refusal to grant that privilege did not state the existence of any necessity for such amendment, and it did not appear that the amendment if made would have given the defendant any new defence, it is not error in the County Court to refuse the amendment.

(a) Approved in *Dakin vs. Pomeroy*, 9 Gill, 6; *Ins Co. vs. Flack*, 3 Md. 354; *Bank vs. McClellan*, 24 Md. 80. See also, *Crawford vs. Brooke*, 4 Gill, 213.

(b) Affirmed in *Ellicott vs. Eustace*, 6 Md. 508; *Schulze vs. Fox*, 53 Md. 48. No appeal lies from the refusal of a Court to allow an amendment of the pleadings. *Ibid*. See *Deford vs. State*, 30 Md. 198; *Scarlett vs. Academy*, 43 Md. 208, to the same effect.

42 * Will an appeal lie from the decision of the County Court exercising its discretion, in allowing or refusing an amendment of the pleadings? *Qr.*

Where the County Court, after verdict for the plaintiff, upon motion arrested the judgment, and there was no error in the bills of exceptions taken by the defendant, this Court overruling the motion in arrest, will proceed to enter final judgment upon the verdict for the plaintiff.

APPEAL from Washington County Court. This was an action of trespass upon the case, brought on the 11th November, 1839, by the appellant against the appellee. The plaintiff below declared as follows, viz :

1st Count. That whereas, heretofore, to wit, on, &c., a certain James Downey, Senior, entered into an agreement in writing with the said defendant, to wit, &c., whereby the said James Downey, Senior, agreed to rent to the said defendant the farm whereon they both then resided, for one year, from the 1st day of April, 1837, to the 1st day of April, 1838, for the sum of three hundred dollars per year, from which sum one hundred dollars shall be deducted for paying taxes, making necessary repairs, and boarding the said James Downey, Senior, and that the said defendant should let Martha Gordon have all the apples which might grow on the old trees in the orchard west of the house, which fruit the said Martha Gordon should remove on or before the 15th day of October in each year, so that the said defendant might pasture the ground; and they further agreed, that the said defendant should let the said Martha Gordon have the second crop of grass of that portion of the meadow which she had usually got, and which she shall cut when he gives her notice that he is cutting his own, and if cut at that time, the said defendant agreed and obligated himself to find horses, wagon and one hand to haul said hay; and they further agreed, that the said James Downey, Senior, should allow sufficient timber to be cut for rails, repairs and firewood, for the use of the house, and no more, without the consent of him the said James Downey, Senior; and afterwards the said James Downey, Senior, and the said defendant agreed in writing, that the said agreement should be renewed for

43 another year, to end on the 1st day of April, in the year of our Lord 1839, to wit, at, &c. And the said plaintiff in fact saith, that the said defendant in pursuance of the said agreement did occupy the said farm from the said 1st day of April, 1837, to the 1st day of April, 1839, by reason whereof, and by virtue of the said agreement in writing, the said defendant became indebted to the said James Downey, Senior, in the sum of four hundred dollars, that is to say, the sum of two hundred dollars for the year ending on the 1st day of April 1838, and the further sum of two hundred dollars for the year ending on the 1st day of April in the year next following, to wit, 1839; and whereas the said James Downey, Senior, before any part of

the said sum of money due for the first said year, had been paid by the said defendant, and before the said sum of two hundred dollars for the second year had become due, and before any part thereof had been paid by the said defendant, to wit, on the 27th day of October, 1838, to wit, at the county aforesaid, assigned the said written agreement to one Martha Gordon, by an assignment in writing, on the said agreement signed by him, the said James Downey, Senior, which assignment was and is in substance and effect as follows, that is to say, whereas I am now boarding with my daughter, Martha Gordon, I do hereby assign unto the said Martha Gordon, all my right, title, claim and interest, in and to the within, and all money due thereon, or that may hereafter become due, as compensation for my boarding and the trouble she may have in attending to and taking care of me. Witness my hand, October 27th, A. D. 1838; and the said James Downey, Senior, thereunto subscribed his name, and then and there delivered the said agreement, in writing, with the assignment thereon, to the said Martha Gordon, to wit, &c.; of which said assignment the said defendant then and there had notice; and whereas, the said Martha Gordon afterwards, and before any part of the said sum of two hundred dollars, due for the first of the said year's rent, had been paid by the said defendant, and before the said sum of two hundred dollars, to be paid for the second year's rent, had become due, and before any part thereof had been paid by the said defendant, to wit, on the 29th day of * March, 1839, to wit, at, &c., assigned the said agreement, 44 in writing, to the said plaintiff, by an assignment in writing, on the said agreement, signed by her the said Martha Gordon, which said assignment is in substance and effect as follows, that is to say, I hereby assign and set over all my right, title, interest, claim, property and demand, to the within article of agreement, unto Robert Gordon, at my risk, for value received. Witness my hand and seal, this 29th day of March, 1839, and thereunto signed her name, and affixed her seal, to wit, at, &c., and then and there delivered the said agreement, with the said several assignments thereon, to the said plaintiff, of which said assignment the said defendant then and there had notice. By virtue of which said several assignments, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff in the said sum of four hundred dollars, in pursuance of the terms of the said agreement, and the said plaintiff became entitled to have and demand the same, that is to say, \$200 for the year ending the 1st day of April, 1838, and the further sum of \$200 for the year ending on the 1st day of April then next following; and the said defendant being so indebted to the plaintiff, afterwards, to wit, &c., in consideration thereof, undertook and then and there faithfully promised the said plaintiff the said sum of four hundred dollars, according to the terms of said agreement, whenever he should be thereunto requested.

2nd Count. And whereas, afterwards, to wit, on, &c., at, &c., the said defendant was indebted unto a certain James Downey, Senior, in another sum of \$400, for the use and occupation of a certain messuage, tenement, farm and land, with the appurtenances, of the said James Downey, Senior, by the said defendant, and at his special instance and request, and by the sufferance and permission of the said James Downey, Senior, for a long time before then elapsed, had held, used, occupied and enjoyed, which said debt of \$400 was evidenced by the written promise of the said defendant, signed by the said defendant, to pay the said sum of money to the said James Downey, Senior, when the same became due,

45 to wit, on, &c., at, * &c.; and whereas, afterwards, to wit, on, &c., &c., the said James Downey, Senior, assigned, by an assignment in writing, signed by him the said James Downey, Senior, said written promise of said defendant, and the said debt thereby evidenced to one Martha Gordon, for value received, of which said assignment the defendant then and there had notice; and whereas, afterwards, to wit, on, &c., at, &c., the said Martha Gordon assigned, by an assignment in writing, signed by her the said Martha Gordon, the said written promise of the said defendant, and the said debt or sum of four hundred dollars, thereby evidenced to the said plaintiff, then and there delivered the said written promise, with the said several assignments thereon to the said plaintiff: By reason whereof, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff, in the said sum of four hundred dollars, as evidenced by the said written promise, and being so indebted, he the said defendant then and there undertook and faithfully promised the said plaintiff, to pay him the said sum of four hundred dollars, whenever he should be thereunto afterwards requested.

3rd Count. And whereas, also, afterwards, to wit, on, &c., at, &c., by a certain agreement, then and there made, between the said defendant and a certain James Downey, Senior, it was agreed, that for the consideration in said agreement thereafter mentioned, the said James Downey, Senior, did rent to the said defendant the farm whereon they the said James Downey, Senior, and the said defendant then resided, the same being the farm of the said James Downey, Senior, from the 1st day of April, 1837, for one year thence next ensuing, for the sum of three hundred dollars for said year, from which sum, one hundred dollars was to be deducted for paying taxes, making necessary repairs, and boarding the said James Downey, Senior, the said defendant to let Martha Gordon have all the apples on the old trees in the orchard west of the house, which fruit the said Martha Gordon was to remove on or before the fifteenth day of October, in the year aforesaid, so that the said defendant could pasture the ground; the said defendant to let the said * Martha

46 have the second crop of grass of that portion of meadow which

she usually got, which she was to cut at that time; the said defendant obligated himself to find horses, wagon and one hand to haul said hay; the said James Downey, Senior, to allow sufficient timber for rails, repairs and firewood, for the use of the house, and no more, without his consent. And the said plaintiff in fact saith, that after the making of the said promise and agreement on the part of said defendant, he the said defendant used, possessed, occupied and enjoyed the said farm, in pursuance of said agreement, for the said term of one year from the said 1st day of April, 1837, to the 1st day of April, 1838, whereby he became liable to pay to the said James Downey, Senior, by virtue of his said promise and assumption, the said sum of two hundred dollars, current money, for the said occupation, possession and use of said farm, and being so liable, he the said defendant, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay the same whenever he should be requested. And the said plaintiff further in fact saith, that afterwards, and before the expiration of the said lease for one year as aforesaid, to wit, at, &c., the said James Downey, Senior, and the said defendant, agreed in writing, that the said agreement hereinbefore set forth, should be renewed and continued for one year more, to end on the 1st day of April, 1839; and the said plaintiff further saith, that in pursuance of said agreement, so renewed and continued as aforesaid, the said defendant continued to possess, occupy and enjoy the said farm, for the term of one more year, ending on the 1st day of April, 1839, whereby he became liable to pay to the said James Downey, Senior, the said further sum of two hundred dollars, for the said use, enjoyment and possession of said farm, from the said 1st day of April, 1838, to the 1st day of April, 1839, according to his promise and assumption aforesaid, to wit, at the county aforesaid, and being so liable, he the said defendant then and there undertook and faithfully promised to pay the same accordingly. And the said plaintiff further saith, that before any part of the said sum of money, due for the first year as aforesaid, had been paid by the said * defendant, and before the said sum of two hundred dollars for the second year aforesaid, had become due, and before any part thereof had been paid by the said defendant, to wit, on the 27th day of October, 1838, at the county aforesaid, the said James Downey, Senior, for a full and valuable consideration, paid to him by Martha Gordon, by his assignment in writing, his name being thereto signed, did assign and transfer the said written agreement to the said Martha Gordon, and all his right, title and interest therein and to the said money, due and to become due thereon, from the said defendant to him the said James Downey, Senior, and then and there delivered the said agreement in writing, with his said assignment thereon, to the said Martha, to wit, at the county aforesaid; of which said assignment the said defendant then and there had notice. And the said plain-

tiff further saith, that the said Martha, afterwards, and before any part of the said sum of four hundred dollars, due as aforesaid, had been paid by the said defendant, to wit, on the 29th day of March, 1839, at the county aforesaid, did assign and transfer in writing to the said plaintiff, by an assignment in writing, under the seal of said Martha, on the said agreement, signed by the said Martha, all her the said Martha's said interest, right, title, claim, property and demand to the said article of agreement, and the rent due on the same as aforesaid, and then and there delivered the said agreement, with the said assignments thereon written, to the said plaintiff, of which last said assignment the said defendant then and there had notice. By virtue of which said several assignments, and by virtue of the Act of Assembly in such case made and provided, the said defendant became indebted to the said plaintiff in the said sum of four hundred dollars, in pursuance and in virtue of the said promises and agreements, and the terms thereof, and the said plaintiff became entitled to have and demand the same; yet, &c.

The defendant pleaded that he did not undertake and promise in manner and form as the said Robert Gordon hath above thereof, complained against him, and of this he puts himself upon the country, &c.

48 * At the trial of this issue the jury found a verdict for the plaintiff for \$459.80 damages, which the Court set aside, and awarded a new *venire*. At the second trial the jury again found for the plaintiff on the first and third counts of the *narr.*, damages \$382.

The defendant moved the Court to arrest the judgment, and assigned the following reasons:

1. That the instrument described and set out in the first and third counts of the plaintiff's declaration, being an agreement containing various stipulations on both sides, besides the undertaking for the payment of money, is not an instrument upon which the assignee can bring suit in his own name, within the meaning of the Act of Assembly in such case made and provided.

2. That there is not in the case set out in either the first or third count of the declaration, any written contract for the reservation of rent for the period, for the rent of which this suit is brought, that is to say, from the 1st of April, 1837, to the 1st of April, 1839.

3. That if there be such a written contract, there is in point of fact no assignment of it, as in the case of the plaintiff is set forth in either of said counts.

4. That the said first and third counts are in other respects erroneous, defective and insufficient.

The County Court being divided in their opinion on the motion of the aforesaid James M. Downey, by his attorney aforesaid, for an arrest of judgment on the first reason assigned, the same was accordingly arrested.

The County Court being unanimous in their opinion as to the remaining reasons, the same were overruled by the Court here.

1st Exception.—At the trial of this cause, the defendant prayed the Court for leave to withdraw his plea and to file a general demurrer to the first and third counts of the declaration, but the Court, [BUCHANAN, C. J. and T. BUCHANAN, A. J.] inasmuch as there had been a new trial at the instance of the defendant, refused permission to amend, and decided that the defendant should proceed to trial upon the issue as it * stood when the new trial was granted.

The defendant excepted.

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2nd Exception,—The plaintiff to support the issue on his part joined in this case, offered in evidence the following agreement, to wit:

This indenture made this 8th of January, 1836, between James Downey, Senior, and James M. Downey, both of Washington township, Franklin County and State of Pennsylvania, witnesseth, that for the consideration hereinafter mentioned, the said James Downey, Senior, doth rent to said James M. Downey, the farm whereon they now reside, from the 1st of April, 1835, for the term of two years, for the sum of three hundred dollars per year, from which sum one hundred dollars shall be deducted for paying taxes, making necessary repairs and boarding said James Downey, Senior. The said James M. Downey shall let Martha Gordon have all the apples that grow on the old trees in the orchard west of the house, which fruit the said Martha Gordon shall remove on or before the 15th of October in each year, so that the said James M. Downey can pasture the ground. The said James M. Downey shall let the said Martha Gordon have the second crop of grass of that portion of the meadow that she usually gets, which she shall cut when he gives her notice that he is cutting his own, and if cut at that time said James M. Downey doth obligate himself to find horses, wagon and one hand to haul said hay. Witness our hands and seals the day and year above mentioned.

JAMES DOWNEY, Sen'r, [Seal.]

JAMES M. DOWNEY, [Seal.]

A supplement to the above articles and they renewed for another year, the said James Downey, Senior, doth allow sufficient timber for rails, repairs and firewood for the use of the house and no more, without his consent, made and agreed to this 13th day of January, 1837.

JAMES DOWNEY, Sen'r.

JAMES M. DOWNEY.

The above articles renewed for another term, to end on the 1st of April, 1839.

JAMES DOWNEY, Sen'r.

JAMES M. DOWNEY.

* On the back of the foregoing agreement are the following endorsements, to wit: Received the rent in full for the year, from the 1st of April, 1835, to the 1st of April, 1836. Witness my hand this 8th day of August, 1836.

JAMES DOWNEY, Sr.

50

Received satisfaction in full for the rent of the year from the 1st April, 1836, to the 1st April, 1837. Witness my hand this 17th day April, 1838.

JAMES DOWNEY, Sen'r.

Whereas I am now boarding with my daughter, Martha Gordon, I do hereby assign unto the said Martha Gordon all my right, title, claim and interest in and to the within article of agreement, and all money due thereon or that may hereafter become due as compensation for my boarding, and the trouble she may have in attending to and taking care of me. Witness my hand October 27th, A. D. 1838.

JAMES DOWNEY, Sen'r.

Witness,—*John Flanagan, James Mayhigh.*

I hereby assign and set over all my right, title, claim, interest, property and demand, to the article of agreement, unto Robert Gordon, at my risk, for value received. Witness my hand and seal this 29th day of March, 1839.

MARTHA GORDON, [L. S.]

The plaintiff also offered in evidence the several receipts endorsed upon the same for the payment of the rent due on said agreement up to the 1st day of April, 1837, which were admitted by the defendant. The plaintiff further offered in evidence the supplement to and renewal for another year of the said agreement, endorsed upon the same, and signed by the said James Downey, Senior, and the defendant, dated 13th January, 1837, and also the other renewal endorsed thereupon, without date, whereby the said agreement was renewed for another term to end upon the 1st April, 1839, and signed by said parties in like manner, the execution of both which renewals was admitted. The plaintiff also offered in evidence the assignment of said agreement from the said James Downey, Senior, to Martha Gordon, endorsed thereupon and dated 27th October, 1838, and also the assignment thereof from the said Martha Gordon to the plaintiff,

51 endorsed upon the said *agreement and dated 29th day of March, 1839, the due execution of both which assignments was admitted. The plaintiff further offered by competent testimony, that the defendant occupied and enjoyed the property mentioned in said agreement from the 1st day of April, 1835, to the 1st day of April, 1839. Whereupon the defendant by his counsel prayed the Court to instruct the jury, that the said agreement being a contract *inter partes* in which various things are stipulated to be done and performed on both sides, and not a mere *chase in action* for the payment only of money, the same was not an instrument on which the assignee could bring suit in his own name, and therefore the said agreement was not admissible evidence under the second count in the plaintiff's declaration; and the Court [BUCHANAN, C. J. and T. BUCHANAN, A. J.] being divided in opinion on the subject-matter of said prayer, the plaintiff was not permitted to read said agreement in evidence under the said second count. The plaintiff excepted.

The judgment being arrested on the verdict, the plaintiff below appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

J. Dixon Roman, for the appellant. *R. Johnson*, for the appellee.

DORSEY, J. delivered the opinion of this Court. We think the County Court erred in arresting the judgment on the verdict rendered in this case, notwithstanding, it is our opinion, that the *chose in action*, assigned in this case, is not such a *chose in action* as would, under the Act of 1829, ch. 51, entitle the assignee, standing upon the assignment only, to the maintenance of an action in his own name. It was not the intention of the Legislature to confer on the assignee any such power, except in cases where the *chose in action* was purely "for the payment of money," and where the only action which, from the nature and stipulations of the *chose in action* assigned, the assignor could have maintained, if no assignment had been
 * made, was that for the payment of the money due on the con- 52
 tract. It never was intended that the assignor should transfer to the assignee a complete right of action, to be prosecuted in his own name, and at the same time retain in himself, under the same *chose in action*, a power to sue for the breach of stipulations, not for the payment of money. But in the first count in the declaration filed in this case, there is an allegation that the defendant, after the assignment and after the money became due, promised to pay it to the plaintiff, which promise would authorize him to sue for it, as he has done, whether the assignment be legal or equitable, and whether the Act of 1829, had ever passed or not. The verdict, it is true, was rendered by the jury on the first and third counts in the plaintiff's declaration; the latter of which contains no such promise to pay. But by the second section of the Act of 1809, ch. 153, it is enacted, "that where any verdict shall be given in any action, suit or demand, in any Court of record of this State, the judgment thereupon shall be stayed or reversed for any defect of form or substance in any writ, original or judicial, or for any variance in such writ from the declarations or proceedings, nor for defects in any count in the declaration, so that there be one good count."

The County Court erred in withdrawing from the jury, under the second count in the declaration, the agreement between James M. Downey and James Downey, Senior, that count having charged a promise of payment by the defendant to the plaintiff, as having been made after the assignments in evidence before the jury. And for aught that appears to us, but for such withdrawal, the promise, as laid, might have been proved. The bill of exceptions does not state or show that the plaintiff had closed the testimony on his part.

In virtue of the Act of 1831, ch. 319, this Court are required in appeals from all the counties therein enumerated, (of which Wash-

ington County is one,) to decide upon all the bills of exceptions, taken at the trials below, whether appealed from or not. It becomes our duty, therefore, to inquire whether the County Court were right

53 in refusing the application of the * defendant, to withdraw the general issue and put in a general demurrer to the plaintiff's declaration.

On behalf of the appellant it has been insisted, that on awarding a new trial, no amendment of the pleadings can be allowed, at the instance of the party on whose application the new trial was granted, no matter with what urgency the appeals of justice might demand it. For this broad proposition no authority has been cited; and we do not think it consistent with the 4th section of the Act of 1785, ch. 80, which declares, "that the Courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever, before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn." When the verdict is set aside, and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had ever been had. But an application for an amendment of pleadings, is not a demand of a matter of right, but is an appeal to the sound judicial discretion of the Court, and to be granted when it shall appear necessary to bring the merits of the question, between the parties, fairly to trial. In this case there was nothing to shew the existence of such necessity, or that the amendment if made, would have given the defendant any defence to the action, to which he would not have been entitled in the condition in which the pleadings then stood. Conceding, then, the affirmative of the proposition, (on which we mean to express no opinion,) whether an appeal will lie, from the decision of a Court exercising its discretion in allowing or refusing an amendment of the pleadings, we think the refusal to permit the defendant to make the amendment asked for, was no ground for a bill of exceptions or an appeal, the defendant having sustained no injury from the decision of the County Court, of which he complains.

Dissenting from the course pursued by the County Court, as stated in the bills of exceptions of both appellant and appellee, and also dissenting from its decision on the motion in arrest, we reverse its judgment.

Judgment on the verdict and award.

54 * THE STATE OF MARYLAND *vs.* JOHN S. E. NUTWELL.

June, 1843.

Certainty to a reasonable extent, is an essential attribute of all pleadings, both civil and criminal, but is more especially so in the latter, where conviction is followed by penal consequences.

One of the objects of certainty in pleading is notice to the party of the nature of the charge against which he is to come prepared to defend himself; another to enable the Court to pronounce the sentence of the law, and the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction. (a)

An indictment under the Act of 1817, ch. 227, section 1, should allege the names of the slave and his master if known; if unknown, the fact should be so averred; and also, that there was no license in existence authorizing the slave to remain in the retailer's store, &c. within the period prohibited by the said Act. It is not a compliance with the Act merely to allege the slave not having a written order or license from his master. The non-existence of a license is an essential ingredient in the offence. (b)

WRIT OF ERROR to Anne Arundel County Court. This was an indictment, in the following words: STATE OF MARYLAND, all that part of Anne Arundel County not included within the limits of Howard District of Anne Arundel County, to wit: The grand jurors of the State of Maryland for all that part of Anne Arundel County not included within the limits of Howard District of Anne Arundel County, upon their oath do present, that John S. E. Nutwell, late of all that part of Anne Arundel County not included within the limits of Howard District of said county, yeoman, on the 28th day of February, in the year one thousand eight hundred and forty-two, the said John being then and there a licensed retailer, did suffer a slave to be in his store-house, in which said house the said John, on the day and year aforesaid, at all that part of Anne Arundel County not included within the limits of Howard District of the county aforesaid, was accustomed to sell distilled liquor between sunset in the evening of the same day and sunrise of the succeeding morning, the said slave then and there not having a written order or license for that purpose from his master, against the Act of Assembly in such * case made and provided, and against the peace, government, and dignity of the State. 55

JAMES BOYLE, Deputy Attorney-General
of the State of Maryland for said County.

The traverser pleaded not guilty; but the verdict being against him he moved in arrest of judgment.

1. Because the indictment does not name the owner of the slave whom it is alleged was permitted by the traverser to be in his store-house.

2. Because the indictment is in other respects defective, informal and insufficient, so that no judgment can be rendered thereon.

The County Court arrested the judgment, and the State sued out a writ of error from the Court of Chancery.

(a) Approved in *Capritz vs. State*, 1 Md. 574; *Rawlings vs. State*, 2 Md. 216; *R. R. Co. vs. State*, 20 Md. 163; *Spielman vs. State*, 27 Md. 524.

(b) Approved in *Franklin vs. State*, 12 Md. 249.

By the Act of 1817, ch. 227, sec. 1, it is enacted, that it shall not be lawful for any licensed retailer or retailers, in Calvert County, &c., or for any person or persons residing in either of those counties, accustomed to make and sell distilled spirits or other liquors, to suffer any free negro or mulatto, or any negro or mulatto servant or slave to be in her or their store-house, or other house, wherein he, she or they may be accustomed to sell distilled spirits or other liquors between sunset in the evening and sunrise of the succeeding morning: Provided always, that nothing herein contained shall be so construed to extend to the case of such aforesaid servant or slave, as shall have a written order or license for that purpose from his master, mistress, overseer or other person in whose employment he may actually be, with the consent of his owner or owners.

The 2nd section provides for recovery of penalty by indictment.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

Boyle, D. A. G., for the State. *Alexander*, for the defendant in error.

56 * STEPHEN, J. delivered the opinion of this Court. We think that the judgment of the Court below in this case was correct, and ought to be affirmed. Certainty to a reasonable extent, is an essential attribute of all pleading, both civil and criminal, but is more especially necessary in the latter, where conviction is followed by penal consequences. One of its objects is notice to the party of the nature of the charge, against which he is to come prepared to defend himself; and it is also necessary, not only that the offence may be displayed upon the record, so as to enable the Court to pronounce the sentence of the law, but to enable the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction. In the case now before this Court, the indictment, we think, is defective, in omitting the name of the slave and that of the master, if known, and if not known, the fact should have been so stated in the indictment. Such an averment in the indictment was requisite, not only to inform the accused of the charge alleged against him, so as to prepare for his defence, but to prevent a second punishment for the same offence, by pleading in bar a former acquittal or conviction. The omission to exclude a license by the necessary averment of a want of one, was also a fatal defect; the non-existence of a license being an essential ingredient in the constitution of the offence, according to the true and sound construction of the Act of Assembly, upon which the prosecution was founded. In other respects, the allegations as to time and place may be sufficient, being conformable to the language of the Act, which is rather carelessly drawn; but in that respect, it would be advisable in all future cases, to make the necessary aver-

ments, with greater precision and certainty. The judgment of the Court below is affirmed. *Judgment affirmed.*

* JOHN K. LONGWELL and ANDREW G. EGE, Administrators of JOHN MCCALED vs. CATHARINE RIDINGER, Administratrix of PETER RIDINGER.—June, 1843. 57

Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease, might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under the Act of 1836, ch. 192. (a)

Where the landlord resorts to a distress to recover rent, he is not entitled to interest on the sum in arrear. (b)

For rent due and payable at the landlord's death, his administrator may claim a preference to be paid out of the assets of his deceased tenant, where the claim conforms to the Act of 1836, ch. 192.

The remedy by distress for rent in arrear is not within the Act of Limitations.

APPEAL from the Orphans' Court of Carroll County. On the 20th March, 1843, the appellants filed their petition, alleging, that on the 10th May, 1842, Peter Ridinger died intestate, and that the appellee is his administratrix; that their intestate died on the 2nd January, 1843; that McCaleb demised to Ridinger on the 1st April, 1835, a certain messuage and premises lying in said county, for the term of three years, to commence from that day, and after the end of said three years, from year to year, that is to say, that the lease was to continue from year to year, so long as the said parties could agree, and until the one or the other party gave the other party due and legal notice that the lease should determine; that Ridinger agreed to pay the yearly rent of one hundred dollars, payable half yearly; that he entered and was possessed until his death, when the sum of \$498 of the rent aforesaid, for the space of seven years ending on the 1st April, 1842, had become due and was unpaid, and is still in arrear; that said Ridinger resided on the premises at the time of his death, at which time and long afterwards, his principal personal property to the value of \$1,000, consisting, &c., was being and remaining on the premises, subject to being distrained for said rent, and for which a distress by law might have been made; that the said Catharine, *administratrix as aforesaid, has continued upon said demised premises up to this time; that half a year's 58

(a) Cited in *Keller vs. Weber*, 27 Md. 665, where it was held that a landlord may distrain during the term for rent in arrear, after the death of the tenant and before the grant of administration. See Rev. Code, Art. 50, sec. 178.

(b) See *Dennison vs. Lee*, 6 G. & J. 254, to same effect.

rent became due on the 1st October last, and another half year's rent will be due on the 1st April next; that there is at this time a large quantity of growing grain on the said premises, liable by law to be distrained for the said rent, and that the petitioner's claims have a preference over all other claims against said deceased's estate. Prayer, that the administratrix pay the said claim in full and in preference over all other claims, and for other relief, citation, &c.

The account filed with the petition, (Exhibit A,) charged the rent as follows:

	DR.
“ Peter Ridinger to John McCaleb,	
1st October, 1835. To $\frac{1}{2}$ year's rent of farm from 1st	
April last till date.....	\$50
To 7 years interest on the same....	21

The account was so made up from 6 months to 6 months, until October, 1842, and amounted to \$907.50, giving various credits with interest thereon, \$358.14. It was submitted with an affidavit in the usual form to the Orphans' Court, who endorsed it as follows:

10th October, 1842. The foregoing account will pass when paid. The Orphans' Court being satisfied of the justice of the claim.

Test,

J. B., Register, &c.

The petition was then amended and the lease produced, by which it appeared that Ridinger agreed to pay McCaleb, or to his heirs, the reserved rent, &c. The inventory of the personal estate of the deceased Ridinger was also exhibited.

The answer of the appellee did not admit to be true any of the facts mentioned in the petition of the appellants, but put them to proof thereof, nor the accuracy of the account to which she pleaded the Statute of Limitations, and also denied that this claim was entitled to any preference.

The petitioners then prayed the Court to direct plenary proceedings to be taken in the cause, which was done.

On the 17th April, 1843, the Orphans' Court decreed that the appellee should pay the appellants the sum of fifty dollars, **59** * being the amount of rent due for the premises, which accrued from the 1st April, 1842, to the 1st October, 1842, with the interest thereon, the said sum being in the opinion of this Court a claim against the estate of the said Peter Ridinger, for which a distress might be levied, and being justly due to said estate of said John McCaleb, and for which this Court will allow the said administratrix of the said Peter in full as for a preferred claim, and that she pay all costs, &c.

The administrators of McCaleb appealed to this Court.

By the Act of 1836, ch. 192, it is enacted, that from and after the 1st day of May next, all claims for rent in arrear against deceased persons, for which a distress may be levied by law, after the death of the deceased, shall have preference over all other claims against said deceased's estate, except such as now have a preference over

claims for rent in arrear, without the levying of a distress therefor, and the administrator or executor of any deceased person is authorized to pay and discharge such claim for rent in arrear, provided the Orphans' Court of the county shall be satisfied of the justice of said claim, and that a distress therefor might be levied on said deceased's goods and chattels, in the hands of such administrator or executor; and provided also, that nothing in this Act contained shall be construed to divest or in any manner impair the right of any person having a claim for rent in arrear against a deceased person, to pursue his remedy therefor by distress in the cases, and in the manner now allowed by law.

SEC. 2. *And be it enacted*, that the Orphans' Court, before passing or allowing any such claim in the settlement of the accounts of an administrator or executor, shall be satisfied, on proof of the correctness of the claim, and that a distress could be levied and maintained therefor, but nothing in this Act contained shall be construed to compel an administrator or executor to pay any such claim, although passed by the Orphans' Court, if he shall think proper to dispute said claim.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

* *Raymond*, for the appellants. *Maulsby*, for the appellee.

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BY THE COURT—

This Court is of opinion that the rent in arrear due from Peter Ridinger to John McCaleb on the 1st day of October, 1842, could have been distrained for by the said McCaleb, who died on the 2nd January, 1843, the administratrix of the said Peter Ridinger having continued the tenancy of her intestate up to the time of, and after the death of the said McCaleb, the landlord and owner of the fee of the said demised premises. It is therefore further ordered, adjudged and decreed, that the claim of the said appellants to and for the sum of \$457.16, under and in conformity to the Act of 1836, ch. 192, be and the same is hereby approved and passed, as having a preference over all other claims against the said Peter Ridinger's estate, except such as are excepted by the said Act of 1836, and that the said appellee be and he is hereby authorized to pay the same to the said appellants.

Decree reversed, with costs.

JAMES MULLIKEN vs. THEODORE R. S. BOYCE.—December, 1843.

The plaintiff, upon the sale of a horse by him, promised the defendant, the purchaser, to obtain a certificate from the breeder, that the animal was thoroughbred, and send it to him. In an action to recover the amount

of a note given for the purchase money, the defendant prayed the Court to instruct the jury that the plaintiff could not recover, unless the jury should find, that the horse was thoroughbred, which the Court refused, and instructed the jury that the plaintiff could not recover unless he furnished the promised certificate within a reasonable time from the making of the contract. This was affirmed upon appeal.

Upon the sale of a horse, the seller agreed to furnish the buyer with a breeder's certificate that the horse was thoroughbred. The latter accepted the animal, and retained him without any offer to return him. In an action upon a note for the purchase money, though the plaintiff had failed to * furnish the promised certificate, he may still recover the actual value of the horse sold. (a)

61 • Where a defendant is not prejudiced by the erroneous instruction of the Court below, or where such an instruction is beneficial to him, this Court, upon his appeal, will not therefor, reverse the judgment.

A promise by the vendor of a horse to furnish a breeder's certificate that the animal was thoroughbred, does not authorize the defendant in an action against him for the purchase money, to introduce the opinion of a witness who had seen its pedigree as forwarded by the plaintiff to the defendant, that he did not consider it thoroughbred, as evidence to the jury, without producing the paper which contained it.

A witness is not competent to speak of the contents of a paper-writing or document without producing it. (b)

Where a defendant lived with the witness, and kept papers at his house, and had also a plantation and house to which he frequently went, and where the witness had seen papers which he supposes belonged to the defendant, an unsuccessful search for a paper alleged to be left at the house of the witness, and no search anywhere else, is not sufficient to let in secondary evidence of the contents of the paper as a lost paper. (c)

APPEAL from Prince George's County Court. This was an action of assumpsit, brought on the 2nd March, 1840, by the appellee against the appellant, to recover the amount of a promissory note of the defendant for \$350, dated 28th September, 1837, payable to the appellee or order. The declaration also contained the common money counts. The defendant pleaded *non assumpsit*, and the jury found a verdict against him for \$445.37, on which judgment was rendered.

(a) Cited in *Cline vs. Miller*, 8 Md. 286; *Groff vs. Hansel*, 33 Md. 168. See *Hyatt vs. Boyle*, 5 G. & J. 66, note (c).

(b) It is a well established rule that the contents of a written instrument, if it be in existence, must be proved by the instrument itself, and not by parol evidence. *Higgins vs. Carlton*, 28 Md. 136. See *Calvert vs. Cox*, post, m. p. 95; *Troxall vs. Applegarth*, 24 Md. 163.

(c) Affirmed in *Glenn vs. Rogers*, 3 Md. 321. Cf. *Boothe vs. Dorsey*, 11 G. & J. 169. The law requires *bona fide* and diligent search for the paper itself in the place where it is most likely to be found. The degree of diligence required depends upon the character and value of the paper, but the party relying on secondary proof must show that he has exhausted, in a reasonable degree, all the sources of information and means of discovery accessible to him, which the nature of the case would suggest. *Glenn vs. Rogers*, supra.

1st Exception.—At the trial of the cause, the plaintiff to support the issue on this part joined, offered in evidence to the jury the following promissory note, which was admitted to be in the handwriting of the defendant, which is as follows:

Upper Marlborough, 28th Sep., 1837.

\$350. Two years after date, I promise to pay T. R. S. Boyce, or order, three hundred and fifty dollars, for value received, with interest, payable at the Bank of Baltimore. JAMES MULLIKEN.

The defendant to support the issue on his part joined, then proved to the jury by William D. Bowie, a competent witness, that he was present when the contract was made, for which the said note was given, and that said note was given for the * purchase money of a brown mare, sold and delivered by plaintiff to defendant, who kept possession thereof until the mare died; that the said plaintiff sold the said mare, and the defendant purchased the same on the express stipulation and condition on the part of the plaintiff that she was a thoroughbred animal, and that the plaintiff promised to furnish to the defendant a certificate to that effect from the breeder, a Mr. A. S. Allen, of Virginia, and at the time of said sale, gave to the defendant a short memorandum of her pedigree, which said memorandum he declared contained her true pedigree, but it was declared unsatisfactory at the time by the defendant, on the ground that it did not trace the pedigree of said mare far enough, and that it was not the breeder's certificate; and thereupon the plaintiff assured the defendant that he would obtain a certificate that the said mare was thoroughbred, from the breeder, a Mr. A. S. Allen of Virginia, and send the same to defendant, and defendant agreed to receive such certificate as evidence of that fact, on which assurance being given, the defendant then executed the said note, on which this suit is brought. The defendant then proved by the same witness, that about eighteen months afterwards the defendant called on the plaintiff in Baltimore, for the pedigree of said mare, and demanded the certificate from the breeder, of her being a thoroughbred animal, and that the said certificate was not furnished by the plaintiff at that time, but the plaintiff promised to furnish it at some future time, which defendant agreed to. The plaintiff then proved by the said witness, that some eight months, or a year afterwards, and before the commencement of this suit, a paper purporting to be a certificate of pedigree of said mare, from Mr. A. S. Allen, the breeder of said mare, was enclosed in a letter from the plaintiff to the defendant, through the mail, and that said paper was received by the defendant. The defendant then proved, that the said paper, purporting to be a certificate of the pedigree of said mare, was objected to by him to the witness at the time of its reception, but the plaintiff was not present, on the ground that it was not a certificate of the said mare's being a thoroughbred animal. Upon the

63 * foregoing evidence the defendant prayed the Court to instruct the jury, that it was incumbent on the plaintiff before he could recover in this action, to prove that the said mare was a thoroughbred animal, and that unless they find from the evidence that the said mare was a thoroughbred mare, that then they must find a verdict for the defendant, but the Court [STEPHEN, C. J. and KEY, A. J.] refused to grant the said prayer, but were of opinion and so instructed the jury, that if the jury find from the evidence in the cause that the note on which this action is brought, was passed by defendant for a mare represented by plaintiff to be thoroughbred, and that plaintiff agreed to furnish defendant a certificate of her being thoroughbred, as evidence of that fact, then the plaintiff cannot recover, unless he shews a compliance with the contract, by having furnished such a certificate within reasonable time from the time of the contract; to which opinion of the Court refusing to grant the defendant's prayer as asked for, and to their opinion as given, the defendant excepted.

2nd Exception. At the trial of this cause, after the evidence had been given, which is contained in the first bill of exceptions, which by agreement is made a part of this bill of exceptions, the defendant offered to prove by William D. Bowie, a competent witness, that the sum of \$350, the amount of the note on which this suit was brought, was agreed to be paid by the defendant to the plaintiff, in consideration of her being sold as a thoroughbred mare, and that said sum was more by \$250, than the value of said mare, if she had been sold as a common or cold-blooded mare, or any other common mare of her appearance and size, and then asked the said witness whether he had ever seen the pedigree of said mare, and from his knowledge of the pedigree of said mare, he considered her to be a thoroughbred animal, but the counsel for the plaintiff objected to the said witness answering said question, unless the defendant would produce the certificate of pedigree of said mare, and the Court sustained the objection of plaintiff's counsel, and refused to permit the said witness to answer the said question; to which opinion of the Court, and to their refusal as aforesaid, the defendant excepted.

64 * 3rd Exception. At the trial of this cause, and after the Court had given the opinion expressed in the second bill of exceptions, which by agreement is incorporated with and made a part of this bill of exceptions, the defendant, for the purpose of letting in secondary proof of the contents of said certificate of pedigree, proved to the Court by the testimony of William D. Bowie, a competent witness, that the certificate of the pedigree of said mare, which was furnished by the said plaintiff to the defendant, in the manner and at the time stated in the preceding bills of exceptions, was at one time in the possession of the witness, and its contents were read by him; that he returned said certificate to the said defendant, who at the time lived with the said witness, although said de-

defendant owned a plantation and house, to which he frequently went, and where witness has seen papers which he supposes belonged to defendant; that said witness has himself looked for the said certificate of pedigree, and has not been able to find it, and that he has seen the defendant look among the papers at witness' house in a drawer where the said defendant usually kept such of his papers as were of much importance, and that the said certificate of pedigree was not found by the said defendant. Witness further stated, that he had no knowledge of any search made in any other place by the said defendant, and that the said witness does not know that said defendant had papers at his own plantation house, nor does he know that said defendant ever made any search for said certificate of pedigree at the latter place but the Court rejected the said evidence, so as aforesaid offered, and were of opinion that the said evidence was not legally sufficient to warrant the introduction of any secondary or parol proof of the contents of said certificate of pedigree; to which opinion of the Court, and their refusal to suffer any parol proof to go to the jury of the contents of said certificate of pedigree, the defendant excepted.

The defendant appealed to this Court.

The cause was argued before ARCHER, DORSEY, and CHAMBERS, JJ.

* *T. F. Bowie* for the appellants. *W. H. Tuck* for the appellee.

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ARCHER, J. delivered the opinion of this Court. By the contract between the parties, the representation of the plaintiff was gratified by the adduction of the breeder's certificate that the mare was thoroughbred. The prayer, therefore, of the defendant, which called upon the Court to say that the plaintiff could not recover unless the jury believed the mare was thoroughbred, could not be gratified; the plaintiff being entitled to recover the full amount of the note, if the jury should believe the plaintiff had produced the breeder's certificate, according to the terms of the contract. The prayer was wrong in another respect; for had the plaintiff failed to comply with his representation, he would still have been entitled to recover the value of the mare actually sold, as an animal not thoroughbred.

In the instruction given by the Court, the only error we perceive, is in their instructing the jury that the plaintiff could alone recover, upon the production of the breeder's certificate. If the plaintiff failed to produce evidence of this, still he was entitled to recover the value of the animal, as one which was not thoroughbred. But the defendant is not prejudiced by this error; on the contrary it might have proved beneficial to him, and we cannot therefore reverse the judgment of the Court in this respect.

We concur with the Court below in the opinion by them expressed in the second bill of exceptions.

The witness is, in effect, asked to speak of the contents of a paper-writing or document, without its production, for although he is asked whether, from his knowledge of the pedigree of the mare, he considered her to be a thoroughbred mare, yet the question has manifestly reference to the pedigree detailed in a paper which he is asked if he had seen, as the foundation for the question in relation to his opinion of the pedigree.

66 * We also think the Court were right in refusing to permit the evidence of the contents of the certificate to be given in evidence to the jury, as a proper foundation had not been laid for the introduction of such evidence. *Judgment affirmed.*

HENRY S. MITCHELL *a. d. b. n.* of JAMES D. MITCHELL vs. ANN M. MITCHELL, Adm'x of JOSEPH T. MITCHELL.—December, 1843.

The security of an administrator may, under circumstances, become a competent witness for his principal to maintain an action of law to recover money due the intestate's estate; although at one period the administrator may have been guilty of *devastavit* in relation to the same claim. As where from lapse of time, after due notice having been given under the testamentary Act to creditors to assert their claims, they are presumed to have been satisfied and none appeared to exist, and where the sole distributee of the deceased had released both the administrator and sureties from all claims, this obviates all objection on the ground of liability on the surety for the omission of the administrator.

Where a bill of exceptions is sealed, the truth of the facts contained in it can never afterwards be disputed.

A release to an administrator and his sureties may be legally recorded in the Orphans' Court of the County where letters of administration were granted, and a copy certified by the Register of Wills of the same County is competent evidence. (a)

An administrator in his settlement with a distributee may assign the *chose in action* of his intestate by parol.

The Register of Wills is authorized and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence.

Where letters of administration were granted in 1830, and an order of Court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, it was held in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged. (b)

(a) See *Crawford vs. State*, 6 H. & J. 198.

(b) See *Allender vs. Riston*, 2 G. & J. 58.

The Act of 1828, ch. 165, which authorizes the taking of testimony in civil cases, before commissioners to be appointed by the County Courts, manifestly contemplates a case where both the plaintiff and defendant are in existence and actually parties to the litigation upon the record at the time the notice * is given by the commissioners, and the deposition taken in pursuance thereof. **67**

So where a defendant is dead, and no new party having been made, a deposition taken is without authority under that Act.

Where commissioners are appointed under an Act of Assembly by the Courts to take proof between parties, no rule of Court can transfer powers to the commissioners, designed by the Act to be exercised by the Courts or the Judges thereof.

Acts of Assembly made relative to the administration of justice are to be liberally construed for the attainment of that important object.

It is the province of Courts of Justice to expound laws and not to legislate.

APPEAL from Charles County Court. This was an action of *assumpsit*, brought by the appellee against James D. Mitchell on the 22nd July, 1833. Pending the action J. D. M. died, and his executrix Elizabeth A. Mitchell (who also died,) and the present appellant were successively made parties to the case. The defendants pleaded *non assumpsit* and limitations on which pleas issues were joined.

Before the trial the parties filed the following agreement :

It is agreed in this cause that the attendance, in person, of William Carmichael, a witness on the part of the defendant, may be dispensed with at the trial of this cause, whenever the same may take place, and that in lieu thereof, certain letters from the said Carmichael to the late James D. Mitchell and Joseph T. Mitchell, on the subject of a receipt by him, and the payment over of certain moneys by him collected, to a certain Joseph T. Mitchell, on the order of said James D. Mitchell, may be used and read as evidence in the cause at the trial thereof. It is further agreed, that the plaintiff, as administratrix of Joseph T. Mitchell, give the necessary and usual notice required by law for creditors to present their claims against the estate of said Joseph T. Mitchell, and that the same was published in the *Kent Enquirer*, a newspaper published in Kent County, for the time and in the manner as the law directs, the evidence of which may be received from the paper herewith filed, marked exhibit A. It is further admitted, that the personal estate of Joseph T. Mitchell, was more than solvent, and that a large residuum was left for distribution among the * representatives and heirs-at-law, after the payment of all debts, which were presented for payment. The above letters are to be made subject to all legal exceptions as to their admissibility or competency, other than those now waived by this agreement. **68**

THOMAS F. BOWIE, for Defendant.

WILLIAM L. BRENT, for Plaintiff.

Exhibit A—referred to in the foregoing agreement :

MARYLAND, Kent County Orphans' Court.

November 30, 1830. On application of Ann M. Mitchell, administratrix of Joseph T. Mitchell, late of Kent County, deceased, it is ordered, that she give the notice required by law for creditors to exhibit their claims against the said deceased's estate, and that the same be published once in each week for the space of three successive weeks, in the *Enquirer*, printed in Chestertown.

In testimony that the foregoing is truly copied from the minutes of the proceedings of the Orphans' Court of the County (Seal.) aforesaid, I have hereunto set my hand and the seal of my office affixed, this 30th day of November, 1830.

Test,—F. WILSON, Register of Wills for Kent County.

In compliance with the above order, this is to give notice, that the subscriber, of Kent County, hath obtained from the Orphans' Court of Kent County, in Maryland, letters of administration on the personal estate of Joseph T. Mitchell, late of Kent County, deceased. All persons having claims against the said deceased's estate are hereby warned to exhibit the same with vouchers thereof, to the subscriber, at or before the 30th day of May next, they may otherwise by law be excluded from all benefits of the said estate. Given under my hand, this 30th day of November, 1830.

ANN M. MITCHELL.

December 3. Adm'x of Joseph T. Mitchell, deceased.

Letters referred to in the foregoing agreement:

Centreville, 26th March, 1828.

Dear Sir,—Your uncle, Joseph Mitchell, spoke to me when I was last in Kent County, as if he had supposed you had given me instructions to proceed by execution against Gerald Coursey. * As

69 I have received no instructions from you on this subject, I beg you will give me directions. G. Coursey paid me last fall \$1,000, of which I paid \$950 by your order, to Mr. Joseph T. Mitchell.

I think it right to say to you on this subject, that I believe G. Coursey, by some indulgence, will pay your debt and save his property, but from the entire depressed state of the country, his property would now be sacrificed if sold by the sheriff, but being your agent in this business, I will promptly execute any orders you may send. I remain, very respectfully, yours,

WM. CARMICHAEL.

James D. Mitchell Dr. to Wm. Carmichael.

1828. Jan. 5,	To cash p'd Jos. T. Mitchell, by your order....	\$ 950
Dec. 19,	To ditto paid ditto per ditto.....	950
	To commission on \$2,000, at 5 per cent.....	100
		<hr/> \$2,000

Contra.

1827. Nov. 24,	By cash from G. Coursey on judgments.....	\$1,000
1828. Dec. 9,	By ditto from do. on do.	1,000
		<hr/> \$2,000

Centreville, 29th April, 1829.

Dear Sir,—I this day received yours of the 24th, and send you an extract from my books by which you will see the amount of moneys received from G. Coursey and paid over to Mr. Joseph T. Mitchell.

I am, respectfully, yours,

WM. CARMICHAEL.

Centreville, 17th November, 1830.

Dear Sir,—Pressing engagements and absence from home have prevented me from giving an earlier answer to yours of the 27th ultimo. I subjoin an account taken from my books, by which you will see the moneys received and paid over to your uncle. After my last payment to him, I wrote him that a balance was due me from your father, which I neglected to deduct, and requested him to retain the same in his hands, but did not * hear from him afterwards. This balance you can settle at your convenience. I

70

am, respectfully, yours,

WM. CARMICHAEL.

James D. Mitchell Dr. to Wm. Carmichael.

1828. Jan. 5,	To cash paid Joseph T. Mitchell, per your order.....	\$ 950 00
Dec. 19,	To do. do. per do.	950 00
1829. Oct. 15,	To do. do. per do.	950 00
1830. Ap'r 27,	To do. do. per do.	300 00
	To do. do. by check on Bank of Baltimore.....	384 32
	To costs of three suits.....	19 50
	To commission, at 5 per cent.....	187 01
		<hr/> \$3,740 83

Contra.

1827. Nov. 24,	By cash from G. Coursey on judg'ts.....	\$1,000 00
1828. Dec. 8,	By do. from do.	1,000 00
1829. Sept. 12,	By do. from do.	1,000 00
1830. April 8,	By do. from do. balance of jud'ts.....	720 72
	By costs of three suits.....	19 50
		<hr/> \$3,740 22

E. E.

WM. CARMICHAEL.

No. 7, referred to in the foregoing agreement:

Richard Hall, use of James D. Mitchell, Ex'r of France vs. Gerland Coursey. Judgments, &c.

Amounts of debt.....	\$1,337 50
Interest on same from 1st Jan. 1823, to 1st Jan. 1825.....	168 50
	<hr/> \$1,498 00
Int. paid as per endorsement on bonds.....	175 57
	<hr/> 1,322 43
Interest on same to 24th November, 1827.....	150 75

Same, Executor of same vs. Same. Judgments.

Amount of debt.....	\$1,337 50
Interest on same from 1st January, 1823, to 24th November, 1827, (393.33).....	394 71

71** Same, Executor of same vs. Same. Judgments.*

Amount of debt.....	368 87
Interest on same from 1st Jan. 1823, to 24th Nov. 1824....	108 75
	<hr/>
Then paid W. C., attorney.....	3,683 01
	<hr/>
Interest on same to 8th December, 1828.....	2,683 01
	<hr/>
	166 64
	<hr/>
	2,849 65
Then paid W. C., Attorney.....	1,000 00
	<hr/>
	1,849 65
Interest on same to 20th December, 1828....	3 69½
	<hr/>
	1,853 34½
Credit then allowed by Joseph T. Mitchell.....	225 15
	<hr/>
	1,628 19½
Interest on same to 12th September, 1829.....	68 52
	<hr/>
	1,696 71½
Then paid W. C., attorney.....	1,000 00
	<hr/>
	696 71½
Interest on same to 8th April, 1830.....	24 01
Costs of judgments.....	6 55
Costs of do.	6 55
Costs of do.	6 40
	<hr/>
	\$ 740 22½

E. E.

WM. CARMICHAEL.

Amount received by Wm. Carmichael as by above statements:

1827. Nov. 24, Cash	\$1,000 00
1828. Dec. 8, do.	1,000 00
1829. Sept. 12, do.	1,000 00
1830. April 17, Paid W. C., by cash deposited in Bank of Baltimore, the 8th.....	740 22
	<hr/>
	\$3,740 22

* *Contra.*

72

1828. Jan. 5,	Cash p'd Jos. T. Mitchell by your order.....	\$950 00
1828. Dec. 9,	To do. do. do.	950 00
1829. Oct. 15,	To do. do. do.	950 00
1828. Ap'l. 27,	To do. do. do.	684 32
	To commission on \$3,740.22, at 5 pr. ct.....	185 01
	To costs of suit on three judg- ments.....	19 50
		<hr/>
		\$3,738 83

Centreville, *April 30, 1830.*

Dear Sir,—According to my promise, I now send you a statement of the money collected from Mr. G. Coursey. I have an unsettled account with Mr. James D. Mitchell on account of business transacted for his father; the balance due me is between \$60 and \$70. I intended to have retained to this amount, and to have rendered him an account, but it escaped me in the hurry of the moment, and as it is inconvenient for me to transact business with Mr. Mitchell, I beg you to have the goodness to reserve that sum for me, as I will render Mr. M. the accounts.

I have thought on Williamson's business since you left me. I have a judgment against him but not against you, and could only due the replevin bond. There are several cases, and it would greatly increase costs, but I must be governed in this by your determination. I remain respectfully yours,

WM. CARMICHAEL.

1st Exception.—At the trial of this cause, the plaintiff to support issues on her part joined, offered in evidence to the jury the several promissory notes, and the due bill set forth in the declaration, and proved the same to have been signed in the proper hand-writing of James D. Mitchell, the defendant's testator, and also proved the hand-writing of James W. Mitchell on the notes of 23rd Nov. 1820; but offered no evidence of the hand-writing of Elizabeth Mitchell, by whom the said due bill purports to have been assigned.

* \$1,030. Six months after date I promise to pay to Joseph T. Mitchell, or order, negotiable at the Bank of Maryland, one thousand and thirty dollars, for value received, this 20th October 1828. 73

JAMES D. MITCHELL.

\$1,220. On the 8th July next, I promise to pay to Joseph T. Mitchell, or order, negotiable at the Bank of Maryland, twelve hundred and twenty dollars, for value received.

Baltimore, *20th October, 1828.*

JAMES D. MITCHELL.

\$200. Baltimore, *23rd November, 1829.* On the first day of October, 1830, I promise to pay to the order of James W. Mitchell, two hundred dollars, for value received.

JAMES D. MITCHELL.

On the back of the foregoing promissory note is thus written, to wit, James W. Mitchell.

§200. Baltimore, 23rd November, 1829. On the first day of June, 1830, I promise to pay to the order of James W. Mitchell, two hundred dollars, for value received. JAMES D. MITCHELL.

On the back of the foregoing promissory note is thus written, to wit, James W. Mitchell.

And then, for the purpose of maintaining the issues joined on her part on the second and third pleas, on the pleas of limitations, and for the purpose of proving an acknowledgment of the said James D. Mitchell, within three years before the present suit was brought, of his indebtedness on said notes, and also to prove the hand-writing of Elizabeth Mitchell, to the assignment of the said bill, offered to swear to the jury William L. Brent, but the defendant produced an authenticated copy of the administration bond of the plaintiff on Joseph T. Mitchell's estate, dated 30th November, 1830. Certified to be a true copy of the administration bond given by Ann M. Mitchell, administratrix of Joseph T. Mitchell, as taken from the original bond now on file in his office, by the Register of Wills of Kent County. And proved that the said William L. Brent was one of the plaintiff's sureties in said bond, and objected to the competency of

74 said witness, on the ground that he was liable * for any *devastavit* which the plaintiff might have committed in the administration of said estate as the plaintiff's surety, and that under the circumstances of this case, and in the present cause, said witness had an interest in the result of this suit. This objection on the part of defendant to the competency of said witness, the Court sustained, and thereupon, the plaintiff, for the purpose of showing that said witness was competent to give the testimony for which he was called, produced the following papers, to wit, the administration account of Ann M. Mitchell on Joseph T. Mitchell's estate, passed and sworn to on the 12th of May, 1832, which showed a balance due the estate, consisting of negroes not divided \$2,812, and which was also certified to be a true copy taken from the records of his office, by the Register of Wills for Kent County, under his official seal.

And also read the agreement and exhibits in this cause, filed 21st August, 1841. See *ante*.

And also a certified copy of the release of Joseph T. Mitchell, Jr., the sole heir-at-law of Joseph T. Mitchell, who is admitted to have been of full age, and also the original release :

MARYLAND, Kent County, *Sct.* I hereby certify, that it appears from an administration account, passed by Anna M. Mitchell, administratrix of Joseph T. Mitchell, late of Kent County, on the 12th May, 1832, that after the payment of all just debts and claims due and owing by the said Joseph T. Mitchell, that there was a considerable balance due the estate, amounting to the sum of of \$2,812, and consisting of negroes undivided; and I also certify, that on the 1st May, 1838, Joseph T. Mitchell, the sole child

and heir-at-law of the said Joseph T. Mitchell, deceased, appeared in open Court, in the Orphans' Court of the said Kent County, and the said Court being satisfied that he was of legal age, filed, to be recorded in my office, a release in the following words and figures, and which was accordingly recorded by order of the said Court: Whereas, a settlement has taken place between my mother, Mrs. Anna M. Mitchell, as administratrix of my deceased father, Joseph T. Mitchell, and as my acting guardian, and I * have received from her full possession of my estate, real, personal and mixed, 75 it is my desire to place on record, the evidence of such full settlement and a full discharge of her sureties; this therefore is to certify, that I do acknowledge the receipt in full of all the share or portion of my said deceased father's estate, to which I am entitled, and I do hereby release, acquit and discharge the said Ann M. Mitchell, and her sureties, and her or their executors or administrators, of and from all claim and demand therefor. Given under my hand and seal, this first day of May, eighteen hundred and thirty-eight.

JOSEPH T. MITCHELL, [Seal.]

Witness—*Samuel Covington.*

MARYLAND, Kent County, *Sct.* Be it remembered, that on this first day of May, eighteen hundred and thirty-eight, before me the subscriber, a justice of the peace of the State of Maryland for Kent County, personally appeared the within named Joseph T. Mitchell, and acknowledged the foregoing receipt and release as his act and deed, and to be discharged for the purposes therein mentioned. Acknowledged before,

SAMUEL COVINGTON.

I hereby certify, that the above is a true copy of the original release, now on record in my office. In testimony whereof, (Seal.) I have hereto subscribed my name and affixed the public seal of my office, this 11th day of August, 1841.

JAMES F. BROWNE,

Register of Wills for Kent County, Md.

Whereas, a settlement has taken place between my mother, Mrs. Ann M. Mitchell, as administratrix of my deceased father, Joseph T. Mitchell, and as my acting guardian, and I have received from her full possession of my estate, real, personal and mixed, and it is my desire to place on record the evidence of such full settlement, and a full discharge of her sureties; this therefore is to certify, that I do acknowledge the receipt in full of all the share or portion of my said deceased father's estate, to which I am entitled, and I do hereby release, acquit and discharge the said Anna M. Mitchell, and her sureties, and her and their heirs, executors or administrators, of and from * all claim and demand therefor. Given under my hand and seal, this first day of May, eighteen hundred and thirty-eight. 76

JOSEPH T. MITCHELL, [Seal.]

Witness,—*Samuel Covington.*

On the back of the foregoing is thus endorsed: "Filed May 1st, 1838. Recorded in Liber B. book, vouchers No. 5, folio 328.

J. F. BROWNE, Register Wills."

And also the following assignment of the plaintiff, of the *choses in action* in the present suit, to the said Joseph T. Mitchell, Jr.

Know all men by these presents, That I, Ann M. Mitchell, administratrix of all and singular the goods and chattels, &c., of my late husband, Joseph T. Mitchell, having paid all the creditors of the said, the late Joseph T. Mitchell, do hereby assign, transfer and set-over to Joseph T. Mitchell, the sole child and distributee of my said husband, deceased, by way of distribution, all the *choses in action* and evidences of debt, filed in the Charles County Court of the State of Maryland, in a suit brought by me, as administratrix of the said Joseph T. Mitchell, deceased, against James D. Mitchell, and now pending against the executrix (or administratrix,) of the said James D. Mitchell. Witness my hand and seal, this 17th day of August, 1831.

ANN M. MITCHELL, [Seal.]

From which said papers, and the facts in evidence as aforesaid, the said plaintiff contended and insisted before Court, that the said witness was released from all liability on said bond, and that he was in consequence of said release, a competent witness in the present suit, which opinion the Court, [C. DORSEY, A. J.] gave, and permitted the said witness to be sworn to the jury for the purpose aforesaid; to which opinion of the Court, and to their permitting the said witness to be sworn to the jury as a competent witness in this cause, the defendant excepted.

2nd Exception. In addition to the evidence in the previous bills of exceptions, which is made a part of this, the defendant in support of

77 the issues on his part joined, gave in evidence * to the jury, that Elizabeth Mitchell, the administratrix of James D. Mitchell, who was a party to this suit previous to her death, departed this life during August Court, eighteen hundred and forty-one; then gave in evidence to the jury, that letters of administration *de bonis non* was granted by the Orphans' Court of Charles County to defendant, on the 14th September, 1841; and then offered to read in evidence to the jury the deposition of Richard B. Mitchell, as follows:

At the request of Henry S. Mitchell, the following notice and deposition was recorded this 23rd day of March, Anno Domini, 1842. *To Mrs. Ann M. Mitchell, or her attorney:*

You will please take notice, that I shall on the 25th day of the present month, between the hours of 10 o'clock, A. M. and 2 o'clock, P. M. of the same day, at Myrtle Grove, the residence of Mr. Henry S. Mitchell, in Charles County, Maryland, at the request of said Henry S. Mitchell, then and there proceed to take the deposition of Mr. Richard B. Mitchell, who is now dangerously ill at said place, and not expected to live, to be read as evidence in the trial of the cause now depending in Charles County Court, in which Ann M.

Mitchell, administratrix of Joseph T. Mitchell, is plaintiff, and Elizabeth A. Mitchell, executrix of James D. Mitchell, is defendant.

January 24th, 1842.

JAMES BRAWNER, Commissioner.

Service admitted this 24th day of January, at $\frac{1}{2}$ past 4 o'clock P. M., for what it is worth.

WM. L. BRENT,

At Washington City, District of Columbia.

Ann M. Mitchell, Adm'x of J. T. Mitchell vs. E. A. Mitchell, Ex'x of J. D. Mitchell. Interrogatories to R. B. Mitchell, on the part of defendant.

Interrogatory 1st, 2nd and 3rd.

CHARLES COUNTY, *Sct.* At the instance of Mr. Henry S. Mitchell, the undersigned, a commissioner appointed by the Honorable the Judges of this Court, under an Act of Assembly passed at December Session, 1828, ch. 165, in accordance with a previous notice served on William L. Brent, Esq., attorney for Mrs. Ann M. Mitchell, as will appear by reference to said * within notice, herewith returned, did attend at Myrtle Grove, the residence of Mr. Henry S. Mitchell, on the 25th of January, 1842, between the hours of 10 o'clock A. M. and 2 o'clock P. M., and proceeded to take the deposition of Mr. Richard B. Mitchell, who being sworn on the Holy Evangely of Almighty God, to the interrogatories propounded, answers as follows :

To the first interrogatory, yes. 2nd and 3rd.

Taken and subscribed by me,

JAMES BRAWNER, Commissioner.

Taken by James Brawner, a commissioner appointed and duly qualified by the Judges of Charles County Court, to take depositions, in pursuance of the Act of Assembly passed at December Session, 1828.

The plaintiff then gave in evidence to the Court, that said Richard B. Mitchell died on the 26th January, 1842, and that he was expected to die for a week previous to the taking of said deposition. The plaintiff then gave in evidence, that at the time said deposition was taken, the death of Elizabeth Mitchell, the first administratrix of James D. Mitchell, was not suggested on the record; and further gave in evidence, that William L. Brent, the attorney, upon whom the notice of the commission was served, resided in Washington City, thirty miles distant from the place where the said deposition was taken. The defendant then gave in evidence, that Frederick D. Stone, who served the notice on said Brent, returned on horseback, and in time to be present at the time said deposition was taken. And the plaintiff further gave in evidence, that the said plaintiff resided in the City of Baltimore, in Maryland, at the time said notice was given; and further gave in evidence, that the present defendant Henry S. Mitchell did not appear to the present cause until August Court, 1842.

The defendant then read in evidence the following rule of Court, made in pursuance of the Act of Assembly passed at December Session, 1828: "In pursuance of the directions of the Act of the General Assembly of the State of Maryland, passed at the December Session, 1828, ch. 165, we, the Judges of the County Court for the County of

79 Charles do hereby appoint James *Brawner, Senior, John Hughes and George D. Parnham, commissioners to take the depositions of witnesses in the cases therein provided, and that in all cases when they act as such they shall first serve, or cause to be served on the party against whom such deposition or depositions are intended to be used, or his attorney, a written notice containing the name of the person or persons whose deposition or depositions are intended to be taken, and the time and place, when and where it is to be taken, at least eight days before said day, exclusive of the day of issuing and serving such notice, and also in all cases when a real cause exists, the parties or party interested upon making it appear to the satisfaction of the commissioner or commissioners, that his witness is very old, sick, or about to leave the country, it shall or may be discretionary to take the disposition or depositions of such witness, on giving such notice less than eight days as they may think reasonable, all circumstances considered, so that the party interested, his guardian, agent, trustee or attorney, may have a convenient time to attend; and if such party and his attorney, &c., cannot be found, then by leaving said notice at his last place of abode, a copy of which, certified by the commissioner or commissioners, and attested to be served as herein provided, shall be returned by the said commissioner or commissioners, as the case may be, to the clerk of the County Court, with the deposition or depositions so taken; and the Court do allow the said commissioners the of sum four dollars to each commissioner for each day they may act as such.

November 17th, 1829.

J. STEPHEN,
EDMUND KEY,
J. R. PLATER.

The plaintiff then objected to the reading of said deposition in evidence to the jury, because said deposition had not been taken in pursuance of said Act of Assembly and supplement thereto, because the said Henry S. Mitchell, administrator *de bonis non*, was not a party to the record, which objection the Court [C. DORSEY, A. J.] sustained; to which opinion of the Court the defendant excepted.

The defendant appealed.

80 * The cause was argued before STEPHEN, ARCHER, DORSEY and CHAMBERS, JJ.

T. F. Bowie, for the appellant. R. J. Brent, for the appellee.

STEPHEN, J. delivered the opinion of this Court. Two exceptions were taken to the opinion of the Court below in this case, both of

which relate to questions of evidence. In the first exception, the witness produced to give evidence for the plaintiff being incompetent, by reason of interest, certain paper writings or documentary proofs were offered in evidence, for the purpose of restoring his competency, which being held by the Court sufficient for that purpose, the defendant excepted. Much of the argument urged by the appellant's counsel is rendered unavailing by certain admissions and facts stated in the bill of exceptions and the operation of law upon those facts and admissions. In 2 *Tidd's Practice*, 913, the following principle of law is stated in relation to the legal effect and conclusiveness of a bill of exceptions: "when the bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed; for this principle, *Show. P. C.* 120, is referred to. The ground upon which the witness produced by the plaintiff was contended to be incompetent, being his liability for any *devastavit* of the plaintiff, as her surety in the administration of her husband's estate, one of the proofs produced to obviate that objection, was a release executed by Joseph T. Mitchell, who is stated in the bill of exceptions to be the sole heir-at-law of his father Joseph T. Mitchell, and who is expressly admitted in said bill of exceptions to have been of full age at the time it was executed; a certified copy of said release was also produced, authenticated by the signature and seal of the Register of Wills for Kent County. This release contained an express acknowledgment that he had received his full share of his father's estate, and released the administratrix and her sureties from all responsibility therefor. This release was moreover executed after a lapse of eight years * from the time letters of administration were granted, and was acknowledged before a justice of the peace of Kent 81 County, according to law, and was on the same day duly admitted to record. The administration bond, which was given in evidence by the defendant, to shew the incompetency of the plaintiff's witness, fully evinces that letters of administration were obtained from the Orphans' Court of Kent County; and consequently, proves that the acknowledgment was legally made, before a person competent to take it. There is nothing, therefore, in the objection raised by the counsel for the appellant, that it did not appear that the acknowledgment was made before a justice of the peace in the county where the letters were obtained, and that therefore the release was not legally recorded, so as to make a copy of it admissible in evidence. In 2 *H. & G. Rep.* 57, this Court, when speaking upon a similar subject, say: "they were recorded in the office of the Register of Wills of Prince George's County, where George Briscoe died, and where, of course, letters of administration were taken out on his estate, having been previously acknowledged before the said register. So in 6 *H. & J. Rep.* 234, this Court say, "where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity. But this

evidence is not conclusive, it is only *prima facie*, and like all *prima facie* evidence, may be rebutted." The condition of the administration bond given in evidence by the defendant, speaks of Ann Mitchell, as the administratrix of Joseph T. Mitchell, late of Kent County, deceased; and where of course, as this Court say in 2 H. & G. 57, letters of administration were taken on his estate. No sufficient proof was adduced in the Court below to impeach the release or to impair its validity: the written assignment made of the *choses in action* in August, 1841, was not sufficient to invalidate it upon the ground of fraud, as they might have been transferred by parol when the release was executed; and the written assignment subsequently made, might have been intended, as more authentic and better evidence of that fact. As further proof of the competency of the witness

82 to testify * in the cause, the plaintiff offered in evidence a copy of her administration account, which is stated in the bill of exceptions to have been passed by the Court on the 12th of May, 1832, and is certified by the register to be a true copy, taken from the records of his office, and is authenticated by the seal of his office annexed. The admissibility of this account was objected to upon the ground that the register had no authority by law to record it, and that therefore a copy was not evidence. We think that such an objection was entirely groundless and untenable; that the register was not only authorized, but bound by law to record it, for the purpose of shewing to creditors and others interested in the estate, how and in what manner the assets had been administered. By the Act of 1798, ch. 101, sub-ch. 15, sec. 9, it is enacted that, "the Register of Wills in each county already, or hereafter to be appointed, agreeably to the Constitution, shall diligently attend each meeting of the Orphans' Court in his county, and under their direction, make full and fair entries of their proceedings;" among which proceedings are manifestly intended to be embraced, all administration accounts passed and settled under the sanction of such Courts. This account, in which a number of creditors appear to have been paid, was passed by the Orphans' Court, after notice had been given agreeably to the order of said Court for creditors to exhibit their claims for payment, in the year 1832, more than ten years prior to the trial of this case in the Court below, and considerably more than twelve months after the said notice had been published according to said order. After such a lapse of time, it was we think fair to presume, that there was no outstanding claims of creditors to be satisfied, when this case was tried in the Court below, and that the witness was not on that account incompetent to testify. The administration bond offered in evidence by the defendant, bearing date on the 30th day of November, in the year 1830, and the cause was tried in Charles County Court at the August Term, 1842, a period of nearly twelve years had therefore elapsed from the date of the letters, before the trial in this case took place. In the absence, therefore, of any proof of indebtedness,

it is, we think, fair to * infer, that they were all satisfied and discharged at the time the surety in the bond was offered as a witness. In 5 *G. & J. Rep.* 344, this Court say: "it appears then, that a period of about eleven years had expired, from the time letters of administration were taken out upon his estate, before the mortgage was executed;" and this Court have said in the case of *Allender and Riston*, 2 *G. & J.* 86, "in the case now before this Court, it no where appears that there were any debts remaining due and unpaid at the time of the mortgage, or if there were, that the defendants knew of them;" and to use the language of Mr. Justice Ashurst, in 4 *Term Rep.* 645, "if the creditors will lie by, and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied." Under this view of the case, we think that the opinion of the Court below in the first bill of exceptions was correct, and that all objection to the competency of the witness was sufficiently removed. 83

We think, also, that there was no error in the opinion of the Court below in the second exception. The defendant in the suit was dead, and no new party had been made when the notice was given and the deposition was taken by the commissioner. The Act of 1828, ch. 165, under which the deposition was taken, manifestly contemplates a case where both plaintiff and defendant are in existence, and actually parties to the litigation upon the record at the time the notice is given by the commissioner, and the deposition is taken in pursuance thereof. The language of the 2nd section of the Act is, "that either party, in any action depending in the said Courts, after due notice to the other party or his attorney, agreeably to such rule as shall be made by said Courts respectively, may take the deposition of any witness before any one of the said commissioners, to be used as testimony on the trial of such action." The defendant in this case being dead, and no new party having been made, the deposition was taken without legal warrant or authority, according to the provisions of this Act, and was, therefore, properly rejected by the Court. We wish it to be understood, that in deciding the question as to the admissibility * of the deposition offered in evidence in this case, we have been governed exclusively by what we deem the true construction of the Act of Assembly under which it was taken; and we do not wish to be understood as giving any sanction to the rule of Court upon that subject, adverted to in the course of the argument, and which rule we think confers a power upon the commissioners, which was intended by the Legislature to be exclusively exercised by the Courts, or the Judges thereof. It is true, that Acts of Assembly made relative to the administration of justice, are to be liberally construed for the attainment of that important object, but it is the province of Courts of justice to expound laws, and not to legislate; that is a duty which belongs to a different de- 84

partment of the government. We think that there is no error in the judgment of the Court below, and that the same ought to be affirmed.

Judgment affirmed.

DAVID WOLFE, Junior vs. GEORGE HAUVER, Adm'r c. t. a. of
GEORGE HAUVER, Junior.—December, 1843.

The receipt in a deed for the conveyance of land is only *prima facie* evidence of the payment of the purchase money. (a)

It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; an exception introduced for general security and convenience, and to protect mankind from fraud. (a)

The cases of *Wesley vs. Thomas*, 6 H. & J. 24; *Watkins vs. Stockett*, 6 H. & J. 485; *Betts vs. The Union Bank*, 1 H. & G. 175; *Hurn vs. Soper*, 6 H. & J. 277, were instances in which efforts were made to change the character of deeds, or to vary the consideration stated in them, and thereby either to alter their nature and character; or maintain a deed impeached for fraud, by setting up a different consideration from that stated on its face. (b)

A receipt for the purchase money is no necessary part of a deed, as it would, in every respect, be as valid without it, as with it. (c)

Though a party cannot discredit his own testimony, yet he may show that his witness is mistaken; and is not precluded from showing the truth by any testimony, oral or written, which he may produce. (d)

85 * Where the only question presented for the consideration of the Court below, was the admissibility of the parol evidence offered, this Court will not, since the Act of 1825, ch. 117, entertain the enquiry, whether the particular action brought will lie for want of written evidence as required by the Statute of Frauds.

Where the bill of exceptions does not assert that the evidence offered, was all which was adduced by the plaintiff, this Court will not assume that it contained all that was produced, for the purpose of raising a question, not presented by the record.

Where a witness proved the admission of a debt by the defendant in a conversation with him, he cannot, in reply to the question of why he called

(a) Affirmed in *Morgan vs. Bitzenberger*, 3 Gill, 855; *Shepherd vs. Bevin*, 9 Gill, 37; *Cramer vs. Shriner*, 18 Md. 146; *Horner vs. Grosholz*, 38 Md. 525; *Elysville Co. vs. Okisko Co.* 1 Md. Ch. 394; *Glenn vs. Randall*, 2 Md. Ch. 226; *Spalding vs. Brent*, 3 Md. Ch. 414.

(b) Cited in *Ellinger vs. Crowl*, 17 Md. 375; *Smith vs. Davis*, 49 Md. 338; *Sewell vs. Baxter*, 2 Md. Ch. 455. Where a deed is impeached for fraud, the party to whom the fraud is imputed may show the actual consideration paid, provided it be of the same kind as that stated in the deed, differing only in amount. *Smith vs. Davis*, *supra*. See *Cole vs. Albers*, *post*, m. p. 423.

(c) Cited in *Elysville Co. vs. Okisko Co.* 1 Md. Ch. 395.

(d) See *Franklin Bank vs. Steam Nav. Co.* 11 G. & J. 20, *note* (d), to same effect.

on the defendant, be permitted to testify to information which he had received from other persons strangers to the action; though it constituted the inducement to call on the defendant, it was hearsay.

It is the duty of parties where they design to introduce hearsay evidence for the purpose of impeaching a witness, to apprise the Court of such design.

It is incompetent to introduce illegal testimony, and then impeach the witness, by disproving the facts thus illegally established. (e)

A declaration that the defendant is indebted in the sum of, &c., for land called, &c., containing, &c., before that time bargained and sold, delivered and conveyed, by deed bearing date, &c., by the plaintiff to the defendant, and being so indebted, in consideration thereof, undertook and promised, &c., is sufficient to maintain a demand for unpaid purchase money.

The conveyance of land, delivery of possession in pursuance of a deed, or in other words, the execution of the contract on the part of the plaintiff, as vendor of land, raises a duty on the part of the vendee to pay the consideration money which will sustain the judgment of the Court.

(f)

The law equally implies a promise to pay for land sold and delivered, as it does in the case of the sale of goods, wares and merchandise.

APPEAL from Frederick County Court. This was an action of trespass upon the case, &c., commenced on the 27th January, 1841, by the appellee against the appellant. The plaintiff below declared for, that the defendant "was indebted to the said George, in his life-time, in the sum of, &c., current money, for certain parts or parcels of land called Good Luck, &c., in the whole 202 $\frac{3}{4}$ acres of land, before that time bargained and sold by the said George, in his life-time, to the said David, and under and by virtue of that bargain and sale delivered, and by deed of bargain and sale by the said George, in his life-time, bearing date on, &c., to the said David, conveyed at the special instance and request of the said David; and being so indebted, he the said David, in consideration, * &c., &c., with the usual promise, undertaking and conclusion. The defendant pleaded *non assumpsit*, on which issue was joined. 86

After verdict, the defendant moved in arrest of judgment.

1. Because the declaration is in substance defective and insufficient on general demurrer.

2. Because an action of *indebitatus assumpsit* cannot be sustained for the purchase money of the land specified in the plaintiff's declaration.

(e) A witness cannot be cross-examined as to any fact which, if admitted, would be wholly collateral and irrelevant to the matters in issue for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. And if the witness answer such irrelevant question without objection, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. *Sloan vs. Edwards*, 61 Md. 90. See also, *Goodhand vs. Benton*, 6 G. & J. 323.

(f) Affirmed in *Morgan vs. Bitzenberger*, 8 Gill, 354.

3. Because the plaintiff should have declared specially on the contract of sale of said land, and set forth the terms of sale and the mode of payment, according to the true intent and meaning of the parties to said agreement of sale, which motion was overruled.

At the trial of this issue the following exceptions were taken :

1st Exception. The plaintiff to support the issue on his part joined offered and gave in evidence the following deed from George Hauver, deceased, to the defendant, as follows, to wit : This indenture, made this 30th day of December, in the year of our Lord eighteen hundred and thirty-four, between George Hauver of Frederick County and State of Maryland, of the one part, and David Wolfe, Jr. of the same place of the other part, witnesseth, that the said George Hauver, for and in consideration of the sum of two thousand dollars, current money of the United States, to him in hand paid by the said David Wolfe, Jr., on or before the sealing and delivery of these presents, the receipt whereof the said George Hauver doth hereby acknowledge, and from every part and parcel thereof doth hereby acquit, exonerate and discharge the said David Wolfe, Jr., his heirs and assigns forever. And the said George Hauver hath given, granted, bargained and sold, aliened, released, enfeoffed and confirmed, and doth hereby give, grant, bargain and sell, alien, release, enfeoff and confirm, unto the said David Wolfe, Jr., his heirs and assigns forever, all the following parts or parcels of land lying in the county and State aforesaid, to wit, * &c. To have and
87 to hold the said lands and premises to the said David Wolfe, Jr., his heirs and assigns forever, his and their only proper use and behoof, and to and for no other use, intent or purpose whatsoever. He the said George Hauver, for himself, his heirs, executors and administrators, hath covenanted, and doth hereby covenant and agree, to and with the said David Wolfe, Jr., his heirs and assigns, to warrant and forever hereafter defend said lands and premises against him the said George Hauver, and against all persons claiming by, from or under him, them or any of them. In testimony, &c.

The plaintiff then proved by Isaac Draper, a competent witness, that the defendant, immediately after the execution and delivery of said deed, went into the possession of the land conveyed to him by said deed, and has continued in possession ever since, up to this time, and that the said George Hauver died in the month of August, 1837. He then offered further to prove by said witness, that some time in or about the month of December, 1838, the defendant, in conversation with him the witness, admitted that he had not paid all the purchase money for said land, as stated in the said deed, but that a part of it was yet due and unpaid ; to the admissibility of which evidence the defendant by his counsel objected, on the ground that the deed itself which the plaintiff had offered in evidence, under the hand and seal of the said George Hauver, deceased, estopped him from averring or proving that he the said grantor had not received the

purchase money as stated and admitted by him in said deed, but the Court [TH. BUCHANAN, A. J.] was of opinion, that the testimony so offered by the plaintiff was legal and competent for the purpose for which it was offered, and permitted the same to go to the jury. The defendant excepted.

2nd Exception. In addition to the testimony offered in the first bill of exceptions, which is to be taken and considered as a part of this second bill of exceptions, the plaintiff proved by John W. Miller, a competent witness, that some time in the month of March, 1839, he called upon the defendant to pay an account that he witness had against George Hauver, deceased; * that Wolfe then told him that he had received a letter from George Harman, who 88 married one of the heirs of said Hauver, deceased, offering to take \$100 for his share of the purchase money for the land mentioned in said deed; said witness was on his cross examination by the defendant asked by the defendant's counsel whether he was ever acquainted with the defendant; to which he answered, that they were entire strangers. The defendant's counsel then asked the witness why he had called on the defendant for the payment of the debt due to him, not by the defendant, but by the said George Hauver, deceased, in reply to which said question, the said witness said that some of the other heirs of said George Hauver, deceased, had told him that the defendant was to pay the debts of said George Hauver, deceased; to which answer of said witness the plaintiff objected, and the Court [TH. BUCHANAN, A. J.] was of opinion, that the said answer was illegal, and not proper to go to the jury, and rejected the same, and refused to permit the witness to state to the jury that he had been informed by some of the heirs of George Hauver, that the defendant was to pay the debts of George Hauver, deceased, on the ground, it was offering hearsay evidence in the cause; that the witness was competent to prove anything that the plaintiff said to him, but that anything said by other persons not connected with the suit, could not be given in evidence to the jury against the plaintiff; that if any other persons could prove that the defendant Wolfe was to pay the debts of Hauver, they are competent to do so, as witnesses, but that their declarations are not evidence; to which opinion and rejection the defendant excepted.

The verdict and judgment being against the defendant, he brought this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

Palmer and F. A. Schley, for the appellants. Brengle and Worthington, for the appellees.

* ARCHER, J. delivered the opinion of this Court. The first question which arises in this case is as to the admissi- 89

bility of parol evidence to show that the consideration acknowledged in a deed to have been paid, has not in fact been paid. Much contrariety of decision prevails in the various Courts upon this question. The later English cases appear to be decisive against the admission of such testimony; while in this country the weight of authority is the other way. In Ohio, Kentucky, South Carolina, Pennsylvania, New York, Connecticut, New Hampshire and Massachusetts, the acknowledgment of the receipt of the consideration money in a deed has been held to be only *prima facie* evidence. While in North Carolina, Alabama and Maine, such acknowledgment is considered as an estoppel and conclusive. In our own State the decisions have been contradictory.

In the General Court, at May Term, 1796, suit was instituted by O'Neale against Lodge, on a covenant for the sale of land, and the defendant relied on a receipt in the body of the deed given by the plaintiff to the defendant, and also on a receipt endorsed on the deed, acknowledging the receipt of the consideration money, as conclusive evidence of payment. The Court, however, decided it was evidence of the lowest order, because it was but the mere formal part of a deed, and it was every day's practice to have a receipt on the back of a deed, when, perhaps, nine times in ten there was not a shilling paid. In 1802, in the case of *Dixon vs. Swiggett*, which was an action of *indebitatus assumpsit* for land sold, the same Court determined that the plaintiff could not give any parol evidence to prove the non-payment of the consideration money, contrary to his express acknowledgment of it on the face of the deed. This question was again raised in this Court in the year 1827, in the case of *Higdon and Thomas*, 1 H. & G. 139. There an action was instituted by Higdon against the defendants, on a contract for the sale of lands. The plaintiff offered in evidence the contract, and proved the execution and delivery of a deed to the defendant, in which the consideration money was acknowledged to have been received, and

90 proved *that the defendant had, after the conveyance, entered into the possession of the lands conveyed; whereupon, the defendant moved the Court to instruct the jury, that the plaintiff, upon the evidence offered by him, was not entitled to recover. Had the receipt in the deed operated as an estoppel upon the plaintiff, or furnished conclusive evidence of the payment of the purchase money, the direction prayed was the law of the case, and the plaintiff would not have been entitled to recover. So that the question was directly raised in the case, and it was decided by this Court upon the authority of the American cases, that the receipt in a deed was only *prima facie* evidence of the payment of the purchase money. Since that period, we are not aware of any case which has not conformed to it. Certainly none have occurred in this Court, and the subordinate tribunals, it is to be presumed, have yielded obedience to it. It would seem to be too late at this day, to

agitate again this question, which we must consider as firmly settled as any other which could be presented to our consideration.

In the case of *Gully and Grubbs*, 1 *Marshall*, 388, '9, 390, the Court say "they believe the consistent doctrine, and that which accords best with analogy, and with the practice and understanding of mankind, is that the acknowledgment in a deed of the receipt of the consideration, is only *prima facie* evidence of payment. The acknowledgment is inserted more for the purpose of showing the actual amount of consideration, than its payment, and it is in general inserted in deeds of conveyance, whether the consideration has been paid or agreed to be paid. If the consideration had not been paid, such an acknowledgment in a deed would be intended to mean that the specified amount had been assumed by note or otherwise. With these views we accord." It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception from the general rule giving a conclusive effect to written evidence, and it has been properly said, that the exception was introduced for the general security and convenience, to protect mankind from fraud. If the receipt or release in the deed is * to operate as an estoppel, or to be considered as conclusive in its character as evidence, how could promissory 91 notes, taken for the purchase money of land, be recovered? If they remained in the hands of the vendor, he would be estopped by his deed which acknowledged payment for the consideration money. Nor could there be any recovery on any parol contract, in writing, for the consideration money, if a deed acknowledging the payment had been made. To this extent the doctrine would seem to lead inevitably.

The determination of this Court in *Wesley and Thomas*; *Stockett and Watkins*; *Betts and The Union Bank*, and *Hurn and Soper*, will, as we apprehend, be found to have no bearing on this question. These were cases in which efforts were made to change the character of deeds, or to vary the consideration stated in the deeds, and thereby either to alter their nature and character, or to maintain a deed impeached for fraud, by setting up a different consideration from that stated on the face of the deed. But in the case before us, the introduction of the evidence proposed to be offered, neither changes nor affects any right transmitted in the property conveyed by the deed; it operates no change in the legal character of the instrument, nor in any manner affects injuriously any part of the deed as a conveyance. The receipt of the purchase money is no necessary part of the deed, as it would, in every respect, be as valid without it as with it.

It is secondly insisted, that as the plaintiff had offered the deed in evidence, containing the receipt for the purchase money, it was incompetent for him to show that the purchase money had not been paid. The case of *Higdon and Thomas* furnishes a decision against

this position. There the plaintiff offered the deed in evidence, and if the position now maintained was true, the instruction granted by the Court below would have been affirmed; but it was on the contrary reversed. But independent of this authority, the principle is clear and undeniable, that although a party cannot discredit his own testimony, yet he may show that his witness is mistaken, and is not precluded from showing the truth by any testimony, oral or written, which he may produce.

92 *It is contended under the first bill of exceptions, that there being no note or memorandum in writing of the agreement, signed, &c., for the sale of the land in question, as required by the statute of 29 Chas. 2, ch. 3, the action of *indebitatus assumpsit* will not lie. The bill of exception raises no such question, and none such was decided by the Court below, and we are forbidden by the Act of 1825, ch. 117, from the examination of this question. The only question presented for the consideration of the Court below on this exception, is on the admissibility of the parol evidence offered, for the purpose of proving that the purchase money for the land had not all been paid. Whether the plaintiff did or did not produce any memorandum in writing, signed by the party to be charged, the record does not inform us, for the bill of exceptions does not assert that the evidence offered was all which was adduced by the plaintiff.

We concur with the Court below in the opinion by them expressed in the second bill of exceptions. The evidence offered by the defendants was properly rejected as hearsay. It has been argued, that the answer should have been received that the defendants might have an opportunity of impeaching the witnesses' testimony by calling up the witnesses to whom he referred, and by them disproving the witnesses' statement; to this we think there are two objections, which would induce us to affirm the Court's opinion: first, the defendant did not disclose to the Court that his design by the introduction of the evidence, was to impeach the witness, of which, we think the Court ought to have been apprised; and secondly, because it is incompetent to introduce illegal testimony, and then impeach the witness by disproving the facts thus illegally established.

After verdict, a motion in arrest of judgment was made, upon the ground, that the declaration is defective and insufficient, and two reasons are assigned for the motion, viz: that an action of *indebitatus assumpsit* will not lie for land sold, and that the plaintiff should have declared specially on the contract of sale, and set out the terms of sale and the mode of payment * according to the

93 agreement of the parties. In England, the forms of pleading in *Wentworth* and in *Chitty* are given, corresponding with the present declaration.

In 1 *Chitty*, 338, it is said, the common counts relating to real property are for the price of a freehold or leasehold estate, &c., sold

and conveyed to the defendant, when there has been no contract under seal, for the payment of the price. In 2 *Saund. Plead. and Evid.* 502, it is said, when speaking of the action of assumpsit by vendor against vendee of real property, it is usual to insert the common *indebitatus* counts. And the only doubt which has been thrown upon this question, has proceeded from 2 *Chit. Plead.* 32, n. a. But it will be found upon examination of the case of *James vs. Shore*, 1 *Stark. Rep.* 426, referred to by *Chitty*, that the plaintiff sought to recover of the defendant, who had bought the land and refused to take it, the difference between the price at which it had been bought in by the defendant and that for which on a re-sale it had been purchased, and Lord Ellenborough said the commissioners were authorized to re-sell, and having re-sold these lots, they could not be considered as sold to the defendant. This, we think, furnishes no argument against the common count in the ordinary case of the sale of land.

In New York, it has been decided, that *indebitatus assumpsit* will lie in such case, 14 *John.* 210; 20 *John.* 38.

In Connecticut the same doctrine is maintained, and in *Belden and Seymour*, 8 *Con.* 313, it is treated as a settled doctrine, that an action of assumpsit will lie for the price of land agreed to be paid, and the Court cite three cases in that State in which the action was maintained.

A contrary doctrine prevails in Pennsylvania, as appears by the decision of the Court in 11 *Serg. and R.* 49, and the intimation given by the Court in 7 *S. & R.* 311; but these decisions do not appear to us to be satisfactory. In the former case, the question submitted to the Court was, whether, under an *indebitatus assumpsit* count, for goods sold and delivered, you could give evidence of the sale of a growing crop.

* The reasons assigned for the judgment are, that the contract was special and executory; that a growing crop did not exist as goods, wares or merchandise, and was incapable of delivery as such, and that the count gave no notice to the defendant of an intention to recover for a growing crop. These may be very good reasons for the particular judgment of the Court in that case; but they certainly do not apply to the count now under consideration; for here the contract is averred to have been executed by the delivery of a deed of bargain and sale, and full notice is given in the declaration of the character of the claim. The execution of the contract, the contract price, and the land sold, are all stated. In *Harris' Entries*, a count is also given, such as exists in this case, and in *Dixon and Swiggett*, 1 *H. & J.* 252, a general count was relied upon, and no objection appears to have been taken by the eminent counsel engaged in the case. In the case of *Repp vs. Repp*, *MSS.* decided by this Court at June Term, 1842, there was a similar count. We may thus infer that this practice has long prevailed in this State,

and we perceive nothing in principle to disturb it. The conveyance of the land and the delivery of possession in pursuance of the deed, or in other words, the execution of the contract on the part of the plaintiff, raises a duty on the part of the vendee to pay the consideration money, which will sustain the count. Why should not such a duty be created as well by the sale of land as by the sale of goods? It is said, the subject-matter of the contract savors of the realty, and therefore the count is bad. But we have seen no case which sanctions this technical reason, and unless cases be furnished, deciding the question upon satisfactory grounds, we should feel ourselves bound to say, that the law equally implies a promise to pay in the case before us, as it does in the case of the sale of goods, wares and merchandise.

Judgment affirmed.

95 * CHARLES B. CALVERT, Executor of GEORGE CALVERT
vs. RICHARD S. COXE.—December, 1843.

In the absence of all proof to the contrary, judicial courtesy requires this Court to presume, that the County Court discharged its duty according to the rules and practice of such Court, in awarding a commission to take testimony.

So where the County Court assembled on the first day of the month, and proceedings were had in a cause, which resulted in the withdrawal of a juror, and on the twenty-seventh of the following month, the Court ordered a commission on the motion of the plaintiff to be issued; but it did not appear when such motion was made, nor when, nor by whom commissioners were named, it is fair to presume, either that the defendant did name and strike commissioners, or that after reasonable notice, he failed to do so.

The motion of a suitor seeking commission to take proof, is that a commission be issued, naming the place to which he wishes it to be addressed. The Court then grants the usual order to name and strike commissioners.

(a)

The power of selecting the time and place of executing a commission to take testimony, addressed to commissioners out of Maryland, is confided by the terms of the commission, to their sound discretion. (b)

A commission, addressed to commissioners of the District of Columbia, may be executed in Virginia.

In the execution of a foreign commission, no notice to the parties of the time and place of its execution is necessary. All the notice required, is that of the interrogatories sent out with the commission. Actual or

(a) See Act of 1884, c. 82.

(b) Cited in *Young vs. Mackall*, 4 Md. 368; S. C. 8 Md. Ch. 404. When the commission is silent as to the time and place, when and where it is to be executed, the notice is to govern in these particulars; and it is just as requisite that the return should show a compliance with the terms of the notice, as to place and day, as though they had been designated in the commission. *Ibid.*

constructive notice should be given to the opposite party in time for him to exhibit cross interrogatories before the transmission of the commission. (c)

Five days notice given to a defendant, a resident of Maryland, of the time and place of executing a commission in Virginia, about forty miles distant from his residence, is sufficient, and it is no objection that it was executed at the private residence of the witness.

A witness cannot be permitted to state the contents or effect and operation of a written instrument without producing it.

Facts proved on a former trial by a deceased witness, are admissible on a second trial of the same case. They could only be rejected on the presumption, that facts were proven on the first trial, which were inadmissible as evidence, which is not to be intended. The reasonable presumption is, that such facts were alone proved as were admissible. The Court should act on this presumption upon the offer of proof of the deceased witness' testimony, until the contrary appeared. (d)

A defendant who places his defence upon the finding by the jury, "that the compensation claimed by the plaintiff of the defendant, was, according to the agreement of the parties, to be paid out of the estate of C. in the hands of the defendant's testator," cannot ask the Court to instruct the jury, that his testator was not personally liable, though the compensation had not * been paid. The failure to pay out of C's estate was a breach of the contract, for which the testator was personally liable. 96

In an action to recover compensation for professional services, the defendant placed his defence upon the finding by the jury, that a sum certain paid to the plaintiff, "was, according to the contract between the parties, to be paid upon the contingency of the final decision of the cause in favor of C's will," and if they so found, then the plaintiff was entitled to no additional compensation. At the time of making the contract, the law did not authorize, but shortly after the verdict in the will cause, an act was passed, which did authorize an appeal in such cases; services were rendered upon an appeal, and subsequently upon the reversal of the first judgment. The compensation first agreed upon had been paid between the time of rendering the verdict and the passage of the Act authorizing an appeal; *Held*, as there was other evidence tending to show, that by additional or subsequent agreement, the defendant's intestate promised to pay the plaintiff a further compensation, that question was opened for the consideration of the jury.

In an action by an attorney for compensation for professional services upon a *quantum meruit*, it is not competent for the plaintiff to offer evidence as to what sum was paid to, or demanded by, any attorney in particular,

(c) Approved in *Parker vs. Sedwick*, 4 Gill, 321; *R. R. Co. vs. State*, 60 Md. 459. Cited in *Parker vs. Sedwick*, 5 Md. 285, where it was held that when the interrogatories are not filed in time enough to allow the opposite party to file cross-interrogatories before the going out of the commission, then notice of the time and place of taking the testimony given by the commissioners is sufficient, but such notice from the attorney of the party, without the consent of the commissioners, is not sufficient. See Act of 1884, c. 82.

(d) When an offer is made of testimony, taken under a commission, part of which is admissible and part not, the party objecting should, if it can be done, confine his objection to that which is inadmissible. *Pettigrew vs. Barnum*, 11 Md. 484.

for like services. The usual and customary compensation for services of the like kind, is admissible evidence; but what was paid to any particular individual, standing *per se*, is inadmissible. *Per* Prince George's County Court—affirmed by a division of this Court.

The common law of England, in relation to fees of counsellors at law, is inapplicable to the State of Maryland. In a *quantum meruit*, they may recover for professional services rendered.

A defendant below, cannot assign for error (when appellant,) the results of any of his own modifications or additions to the prayer of the plaintiff below. If there be any error for which a judgment in this case should be reversed, it must be found in the addition made by the plaintiff to the instruction as modified and amended at the defendant's instance.

It is error in the County Court to instruct a jury absolutely, though they might have been authorized to grant the same instruction hypothetically.

Where the proof is wholly oral, of the credit due to which the jury only are competent to decide, the Court should not decide the matter of fact, and so withdraw from the jury the credibility of the witnesses and the truth of their statements.

APPEAL from Prince George's County Court. This was an action of assumpsit, commenced by the appellee against the appellant, on the 7th February, 1837, to recover the value of certain professional services as an attorney and counsellor at law, rendered by the appellee to the testator of the appellant, and at his special instance and request.

97 * At October Term, 1837, the defendant pleaded *non assumpsit*, on which issue was joined.

At the trial of the cause, the plaintiff offered in evidence the proceedings under a commission which issued on the 17th October, 1833, which was rejected by the County Court. The plaintiff excepted, but as the appeal was only taken by the defendant, that exception was not reviewed by this Court.

1st Exception. At the trial of this cause, the plaintiff to maintain the issue on his part, offered to read to the jury the depositions taken under the following commission, which issued on the 23d July, 1839, and returned on the 6th April, 1840, which is as follows:

Prince George's County, *Sct.* The State of Maryland to Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hobau, of the District of Columbia, gentlemen, greeting: Be it known that you are appointed commissioners to examine evidences in a cause depending in Prince George's County Court, between Richard S. Coxe, plaintiff, and Charles B. Calvert, executor of George Calvert, defendant. Therefore you are requested, (having first taken the oath hereunto annexed, and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this commission,) that at such time and place as to you shall seem convenient, you cause to come before you, all such evidences as shall be made or produced to you, either by the plaintiff or defend-

ant; and that you examine them upon their corporal oaths, &c.; and that you cause notice to be given to the parties or their attorneys, of the execution of this commission, before you execute the same; and, &c.

Interrogatories to be administered to Thomas Swann, Esq., a witness to be examined on the part of the plaintiff.

1st. Do you know the above named parties, or either, and which of them.

2d. Do you know whether the said plaintiff was employed as counsel by George Calvert in a certain case touching the validity of a supposed will of the late Thomas Cramphin, * deceased, which was contested by a certain Mrs. Davis, and during his life- 98
time by her husband.

3d. In what Court or Courts was such suit pending.

4th. State as fully as practicable the nature, extent and value of the services rendered by said plaintiff to defendant's testator.

5th. How frequently, and for what length of time was said plaintiff so occupied and employed as counsel in said controversy at Rockville and Annapolis, in the Orphans' Court, County Court and Court of Appeals.

6th. In what manner was said controversy finally settled.

7th. State any thing further material to the plaintiff's case.

THOMAS G. PRATT, for R. S. Coxé.

True copy—Test, *Aquila Beall, Clk.*

Washington, 11th November, 1839,

Charles B. Calvert, Esq., Executor of George Calvert, deceased. Sir,—Notice is hereby given to you, that on Saturday next, the 16th inst., between the hours of twelve at noon and six in the afternoon, at the dwelling house of Thomas Swann, Esquire, near the town of Leesburg, in the County of Loudoun, in the State of Virginia, we shall proceed, by virtue of a commission from the State of Maryland, to us directed, to take the depositions of the said Thomas Swann, and such other witnesses as, &c. &c. And that on Monday next, the 18th inst., between the hours of ten in the morning and six in the afternoon, at the office of Joseph H. Bradley, one of us, in the City of Washington, in the District of Columbia, we shall proceed, by virtue of the commission aforesaid, to take the depositions of, &c., and that at the said several times and places you may attend, if you think proper. Yours respectfully,

JOS. H. BRADLEY, &c.

The plaintiff acknowledged service of the notice on him 12th November, 1839, and there was proof of service of same on the defendant, by leaving it at his residence on the 11th November, 1839, by an affidavit made before the commissioners.

At the execution of a commission, issued, &c., directed to Messrs. Joseph H. Bradley, &c., empowering them to examine * evidence in a cause, &c., we the said Joseph H. Bradley, &c., in 99

the said commission named, having met on the 16th day of November, 1839, at the house of Thomas Swann, Esquire, in the County of Loudoun and State of Virginia, pursuant to notice, and taken the oath to the said commission annexed, proceeded to take the deposition of Thomas Swann, Esquire, which is reduced to writing, and transcribed by Robert Ould, Junior, who was appointed clerk by the said commissioners, and took the oath prescribed for such clerk, and to the said commission annexed.

The said Thomas Swann, of lawful age, being first sworn, &c., to the first interrogatory—He knows both.

To the second he answers—Yes.

To the third he answers,—The suit was first pending in the Orphans' Court of Montgomery County, Maryland; the issues were tried in the County Court of said county, and the cause was afterwards carried to the Court of Appeals of Maryland.

To the fourth, fifth, sixth and seventh, he answers,—Sometime previous to the first trial of the issues in Montgomery Court, upon Mr. Cramphin's will, I met the late Mr. George Calvert in one of the streets in Washington, and he stopped me and told me he wished to engage me in the contest which was about to take place in relation to this will; I said to Mr. Calvert, that I had understood that he had already engaged counsel in that case, and that I did not wish to interfere with my brethren in their professional engagements; he said that he had fixed upon or first engaged Mr. Key and Mr. Forrest, to act as his counsel, but that a misunderstanding had taken place between them, and that he had determined to have nothing more to say to them. I asked if nothing could restore the breach between them and as they knew more about the case than a stranger, it would be better to adhere to them if possible. He told me he had made up his mind to have nothing more to say to them, and that if he could not get counsel here, he had decided to go to Baltimore and get counsel there. I then said, that if that was the case I could see no objection * in undertaking the case for him, and that I would

100 think about it, and let him know when I saw him again. I asked Mr. Calvert, what sort of a case it was; whether there would be any difficulty in establishing the will; he said that he knew of no difficulty in the case, and I was under the impression that the trial would be a short one. Mr. Calvert asked me if I should consider a thousand dollars a sufficient compensation to try this case before the jury, and I said it would, being persuaded from his representation at the time, that the labor would not exceed a week. Mr. Calvert and myself parted, and before I saw him again, I saw Mr. Dunlop of Georgetown, who I understood was to have been engaged with Mr. Key, in the contest respecting this will. I asked Mr. Dunlop if their engagement with Mr. Calvert had been broken off; he told me it had. When I saw Mr. Calvert again, I told him I would undertake his cause for him, and would argue his issues before the jury for the

thousand dollars which he had proposed to give. In this engagement I did not consider myself bound to go beyond the jury trial, and expressed this opinion repeatedly after the engagement. Mr. Calvert mentioned to me, that assistant counsel would be necessary, and asked me how I should like Mr. Coxe; I told him very well, and he promised that he should be engaged. I am not certain, but it is probable he requested me to engage him. I well recollect applying to Mr. Coxe, and stating to him the nature of my engagements, and assuring him, that he should be put on the same footing with myself. He consented to join me upon these terms. In this first engagement, I considered the fee of one thousand dollars as a certain fee, to be paid at all events. The impression then was, that the Orphans' Court would allow it, whether we should succeed or not, but at all events we were to have it. Before however we entered upon the trial, we made a change in our contract; we agreed to take a contingent fee of two thousand dollars, in the event of success, and in case we did not succeed, to take our chance of getting what we could from the Orphans' Court. I had little expectation from the Orphans' Court, and always looked to our success * in the verdict as the only chance of payment. We did succeed in this verdict, after most troublesome trial of about **101** twenty days, and Mr. Calvert paid us over two thousand dollars a piece. And so the engagement, as I certainly supposed, was at an end. At the time that this verdict was obtained, there was no law, as I understood, that would authorize the taking of this case to the Court of Appeals; but some short time afterwards a law was passed authorizing an appeal, and the case was removed to the Court of Appeals under this new law. When it was about to come on in that Court, Mr. Calvert sent me a message, requesting that I would attend the trial in the Court of Appeals. I felt some reluctance about going, never having been in the Maryland Court of Appeals before. I determined however to go, and left my farm in Loudoun, and went to Annapolis and made the argument in the case. Mr. Coxe was there also and assisted in the argument, and so did R. Johnson, Esquire. Mr. Calvert was there also. I think we spent about a week in the argument. Nothing was said about compensation in this trial. Mr. Coxe wished an understanding about it, and I begged him not to press it, saying that Mr. Calvert would do what was right. The Court of Appeals set aside the verdict, and the cause was sent back for another jury trial. This decision opened a new course of labor, not in the contemplation of any of us, and not provided for in our original agreement. When the cause came back for another jury trial, we were all aware of the trouble which would attend it. Mr. Calvert saw and conversed with me about the further trial of the cause; he said to me, "you must see it out; I have made considerable advancements out of my own personal funds to carry on this controversy, and can go no further, but go through the busi-

ness, and I will do you justice, liberal justice. If I get possession of the estate, you shall have no cause to complain." I thought he was right in this course, and agreed to go through the business, and to let my compensation depend upon his getting possession of the estate, Mr. Coxe asked me several times, what he was to have for his further services, and I informed *him what had passed

102 between Mr. Calvert and myself, and expressed my wish, that he should fall into this arrangement, and he agreed so to do, and we went through this business with this understanding. We had another jury trial of about twenty days, in which the jury did not agree, and we attended another after that of nearly twenty days; besides this, we repeatedly attended the Court to press the trial, and prevent the further continuance of the case. In the course of the last trial, Mr. Calvert compromised the case, mostly through the agency of Judge Kilgour. I was opposed to the terms, thinking the sum which Mr. Calvert had agreed to pay too high; but as slaves then were very high, and there was always a doubt about the jury's verdict, I acquiesced in the arrangement of compromise, and Mr. Calvert got possession of the estate. Mrs. Davis executed a deed to carry this compromise into effect, and in that deed provision was made to reimburse to Mr. Calvert the money which he had advanced, and for what further moneys he might advance on account of this estate. This provision in the deed was made, among other things, to cover any further compensation that he might make to his counsel for their further services. When this business was ended, Mr. Coxe claimed his further compensation. I told him Mr. Calvert was a particularly tempered man, and perhaps if I dunned him he might take offence, and that I expected he would apply to me, and as soon as he did I would let him know. Mr. Calvert did not apply, and believing that he did not mean to do so, I mentioned the subject to him. He said he would never advance another cent without the sanction of the Court, but referred me to his son Charles, who would act for him in the matter. I accordingly applied to his son, and he repeated what his father had said. I told him we should be content to take what the Court should say was reasonable, but afterwards, perhaps the next day, he said his father was not content to leave it to the Court. I then proposed to make a friendly case, and to leave it to the jury; he said his father would not be ready to try it at the first term. I told him he could take further time if he wished, upon

103 which * he said he could see no objection to this, and that he would see his father and let me know. In a day or two after I saw him, and he told me his father would not consent to this, and I think on the same day I saw Mr. Calvert, and he said "he would not consent to leave it to the Court or jury." I asked him what then was to be done. Upon the footing which we had stood, and the respect I had for him, I could not send a sheriff after him; he said, &c. The two thousand dollars herein mentioned, were paid to me,

and the same sum to Mr. Coxe, for services rendered and past at the time of such payment, and were not in any sense advanced or in consideration of services to be rendered, but wholly in fulfilment of the original agreement, which had been satisfied on our part, before the first verdict in the cause. As to the value of the services, I always supposed that as our labors upon the subsequent jury trials were much greater than those performed by us upon the first trial and previous thereto; and as Mr. Calvert himself had estimated the value of such services, up to and inclusive of said trial at \$2,000, we were justly entitled to a similar sum for said subsequent services, and likewise to an additional compensation of \$500 each, for the argument in the Court of Appeals. I have been in the profession of the law upwards of forty years; I have never been considered immoderate in my charges, and my brethren have frequently complained of me, as being too low in my charges. From the amount in controversy in this case, the number of days spent by us in prosecuting it, and the peculiar character of the cause itself, I consider \$2,500 each, as a very moderate fee for the services rendered by us subsequent to the first verdict. Mr. Coxe often said, that he expected Mr Calvert would give us more than that sum, but I told him I doubted it; yet, that to the extent of \$2,500 each, I had no doubt he would go. Mr. Calvert, in stating to us in advance, the nature and extent of the services required of us, always much depreciated them, telling us that it was a plain case, and would require no great exertion. We found it however very much the contrary, and one of the most laborious causes that I had ever tried. And further the said deponent saith not.

* And we, the said commissioners, do further certify, that pursuant to the said notice to the parties to the said suit, **104** which is hereunto annexed, we did, on Monday the 18th day of November, 1839, meet between the hours of ten in the morning and six in the afternoon of that day, at the office of Joseph H. Bradley, one of us, in the City of Washington, in the District of Columbia, and that some one or more of us was in the said office from the said hour of ten o'clock in the morning until six in the afternoon of that day, and that no other witness was produced by either of the parties before us. And we do herewith return the said commission, interrogatories, notice and depositions to the Honorable the Judges of the said Court, under our hands and seals.

JOS. H. BRADLEY, &c. &c., Commissioners.

The plaintiff then gave in evidence the following proceedings in this cause upon his motion for a commission, viz :

Richard S. Coxe vs. Charles B. Calvert, Ex'r of Geo. Calvert. In Prince George's County Court.

Commissioners in the Case. Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, of the District of Columbia. Let the commissiom issue as prayed.

May 27, 1839.

C. DORSEY.

Interrogatories to be administered to Thomas Swann, Esquire, a witness to be examined on the part of the plaintiff.

Then followed the interrogatories Nos. 1 to 7, as set forth under the commission, which were signed by the plaintiff's counsel and dated 27th May, 1839.

To the reading of this evidence the defendant by his counsel objected.

1st. Because the said commission issued irregularly.

2nd. Because the commissioners therein named had no right to execute the same in the State of Virginia.

3rd. Because the said commission could not be executed at a private house.

4th. Because the commission did not appear to have been executed at the time and place mentioned in the notice, and

105 * 5th. Because the time allowed by the notice to the defendant was too short.

But the Court [STEPHEN, C. J., and DORSEY, A. J.,] overruled the said objections and permitted the said deposition to be read to the jury, which was accordingly read; to which opinion of the Court, overruling the said objections and permitting the said deposition to be read to the jury, the defendant excepted.

2nd Exception. After the evidence offered in the preceding exceptions, and which by agreement shall constitute a part of this exception, and after the Court had decided that the objections urged by the defendant to the reading of the deposition taken under the commission, which issued on the 23rd of July, 1839, were insufficient to exclude it from the jury, the defendant by his counsel, (when the counsel of the plaintiff was about to read the said deposition to the jury,) objected to the following portions of the said deposition:

1st. To that portion of the said deposition which is contained within brackets, commencing with the word "In" and ending with the word "engagement." ["In this engagement I did not consider myself bound to go beyond the jury trial, and expressed this opinion repeatedly after the engagement."]

2nd. To that portion of said deposition on the same page in the brackets, commencing with the word "In" and ending with the word "events." ["In this first engagement I considered the fee of \$1,000 as a certain fee, to be paid at all events."]

3rd. To that portion of said deposition on the same page in the brackets, commencing with the word "And" and ending with the word "end." ["And so the engagement, as I certainly supposed, was at an end."]

4th. To that portion of said deposition in the brackets, commencing with the word ["Mr." and ending with the word "right." ["Mr. Coxe wished an understanding about it, but I begged him not to press it, saying that Mr. Calvert would do what was right."]

* 5th. To that portion of said deposition in brackets, commencing with the word "Mr." and ending with the word "understanding." ["Mr. Coxe asked me several times what was he to have for his further services, and I informed him what had passed between Mr. Calvert and myself, and expressed my wish that he should fall into this arrangement, and he agreed to do so, and we went through the business with this understanding."] 106

6th. To that portion of the said deposition in the brackets, commencing with the word "And" and ending with the word "services." ["And in that deed provision was made to reimburse to Mr. Calvert the money which he had advanced, and for what further moneys he might advance on account of this estate. This provision in the deed was made among other things to cover any further compensation that he might make to his counsel for their further services."] 107

7th. To that portion of said deposition on the same page in the brackets, which commences with the word "When" and ends with the word "know." ["When this business was ended, Mr. Coxe claimed his further compensation. I told him that Mr. Calvert was a particular tempered man, and perhaps if I dunned him he might take offence, and that I expected he would apply to me, and as soon as he did I would let him know."] 108

8th. To that portion of the said deposition included in the brackets, which commenced with the word "The" and ends with the word "cause." ["The two thousand dollars herein mentioned were paid to me, and the same sum to Mr. Coxe, for services rendered and past at the time of such payment, and were not in any sense advanced or in consideration of services to be rendered, but wholly in fulfilment of the original agreement, which had been satisfied on our part before the first verdict in the cause."] 109

9th. To that portion of the said deposition in the brackets, which commences with the word "I" and ends with the word "charges." ["I have been in the profession of the law upwards of forty years; I have never been considered immoderate * in my charges, and my brethren have frequently complained of me as being too low in my charges."] 107

10th. To that portion of the same deposition which commences with the word "Mr." and ends with the word "go." ["Mr. Coxe often said that he expected Mr. Calvert would give us more than that sum, but I told him I doubted it, yet that to the extent of \$2,500 I had no doubt he would go."] 110

The Court sustained all the objections made by the counsel of the defendant to the said deposition, except to that portion of the latter clause of the first part excepted to on the 5th page, which in the clause commences with the word "this" and ends with the word "services." See the 6th objection above. That portion of the said deposition the Court (STEPHEN, C. J. and DORSEY, A. J.) decided

to be admissible, and suffered the same to be read to the jury. The plaintiff excepted to so much of the opinion of the Court as excluded the other portions of the deposition objected to.

The counsel of the defendant excepted to that part of the Court's opinion under which the aforesaid part of the said deposition, commencing with "this" and ending with "services" was admitted.

3rd Exception. In the trial of this cause, and in addition to the testimony before offered, and which it is agreed shall be considered a part of this exception, the plaintiff to maintain the issue joined on his part, offered proof, that in a former trial of this case, a certain Benjamin S. Forrest was examined as a witness, and that the said Forrest is since dead; thereupon, the plaintiff offered to prove by a competent witness, who was present at the time of the trial, what facts were proved by the said Forrest as a witness; and during his examination in the cause, the defendant by his counsel objected to the admissibility of said proof, but the Court admitted it, and suffered the evidence to be given to the jury; to which opinion of the County Court, admitting the said evidence, the defendant excepted.

108 * 4th Exception. At the trial of this cause, after the evidence contained in all the preceding exceptions had gone to the jury, which by agreement shall constitute a part of this exception, the defendant, to maintain the issue joined on his part, proved to the jury by a competent witness, that he the witness, as the agent of the defendant's testator, on the 12th December, 1832, shortly after the first trial in Montgomery County Court, of the issues growing out of the will of Thomas Cramphin, deceased, and which were sent by the Orphans' Court of the County to be tried in the said County Court, which trial resulted in a verdict in favor of the will, paid the sum of \$2,000 to the plaintiff; that on the day the money was so paid, Thomas Swann, Esq., and Z. C. Lee, Esq., who were also employed as counsel for said Calvert, (together with the plaintiff,) called at the office of the witness, when the said Swann, after an examination of the law upon the subject, said the case affecting the validity of said will was finally settled by the said verdict; that the defendant's intestate was also present, and that thereupon after the expression of the said opinion by the said Swann, he the said Swann and the said Lee asked the said Calvert for the fees which had been respectively promised to be paid to them, telling him he would soon be able to get it out of the estate of said Cramphin; that the said fees were accordingly paid to them, and on the same day the sum of \$2,000 as aforesaid was paid to the plaintiff as his fee. And the defendant then read in that connexion a letter from the plaintiff to the said Swann, dated the 16th February, 1836, which is as follows, to wit:

Dear Sir,—On examining your draft of a letter to Mr. Calvert, it occurs to me to make a suggestion or two as matters of fact. In the first place the entire arrangement was made between Mr. Calvert and yourself. I was confined to my bed by a severe fit of illness, and

unable to enter into the merits of the controversy, or to estimate the amount of compensation, and equally unable to investigate the question, which I deemed a preliminary one, viz: whether the circumstances which had led to the separation of Mr. Calvert from his former counsel were such as to permit us to assume their position without a violation * of professional courtesy. This situation induced me to repose the whole matter to you. **109**

In consequence of this arrangement I have had no personal understanding with Mr. Calvert on the subject. Your first information was that Mr. C. would pay us \$1,000 each, for the trial of the issues, without any contingency, it being the opinion of all of us, that it was Mr. Calvert's right and duty to defend the case, and that his expenses would be allowed him by the Orphans' Court out of the estate, whatever might be the final result. In this state of things, Mr. Lee and myself attended at Montgomery for the purpose of having the issues amended. Before I was able myself to attend, they had been prepared. We did not succeed, and our proposed amendments were disallowed. Between this time and the trial we learned that the Orphans' Court would not allow Mr. C. his expenses if the will should be set aside. And you then apprised me that Mr. Calvert, fearful of committing himself personally, had suggested a change in the terms of our arrangement, and preferred giving us \$2,000 in case we succeeded, to \$1,000 absolutely. Concurring with him in his views, we both acceded to this modification of the contract. We tried the issues, succeeded, and the fee was paid as had been agreed. At this time every one believed the cause was terminated. There was no Act of the Legislature allowing an appeal, and none could be taken. During that winter a law was obtained authorizing an appeal to be taken, and the cause was carried to the Court of Appeals. We attended and argued the cause without anything passing between Mr. Calvert and myself personally on the subject of compensation, but with a distinct understanding on your part and mine that we were to be paid, and I had made up my mind, and I believe you also, that we would endeavor to obtain an allowance from the funds of the estate to reimburse Mr. Calvert. The same thing occurred at the several terms when we were at Montgomery to try the issues; three or four times I believe.

When the compromise was arranged, the clause providing for the reimbursements of moneys already and thereafter to * be paid was introduced to protect Mr. C. from every difficulty, and **110** you may remember the particular phraseology I employed in my draft, leaving Mr. C. free to exercise his own discretion on the subject.

My position in the cause prevented me from making any arrangement with Mr. C., considering myself as having reposed that in your hands, fully satisfied to confirm any arrangement you might make; but you always stated that we should be fully and liberally com-

pensated if Mr. C. should succeed; and if he failed we would endeavor to obtain remuneration for him and compensation to ourselves through the Orphans' Court. If I had entertained any difficulty on the subject it would have been removed by a remark which Mr. C. made in my presence, that his objection to paying his former counsel did not arise from any question as to the amount to be paid to such of them as he had wished to be employed, but there were too many of them, some whom he did not want. This I considered as a pledge that we should each receive for our services in the will cause, at least as much as the counsel were each to receive under that arrangement.

In reference to the other matters; the suit against Mr. C. by his former counsel; the claim of Forrest; the attempt to revoke the letters of administration, I considered them as wholly independent of this original understanding, and to be the subject of distinct charge.

The foregoing may suggest some views of the matter worthy your attention.

Very truly yours,

February 16th, 1836.

RICH'D S. COXE.

P. S.—I may as well mention, that the views I had taken of the subject were confirmed by every conversation with Caroline and her children, all of whom professed themselves willing and desirous that we should be paid far beyond the amount asked by the former counsel, and who, I have no doubt, would now approve of such a course.

Thomas Swann.

R. S. C.

And he further proved, that the plaintiff had told the witness that the said Swann had made the contract for the fee, * and **111** had authority from him the plaintiff for that purpose. And the defendant further proved by the said witness, that he had heard the said Swann say that the original contract made by him with the said Calvert, upon the subject of fees to be paid him and the said plaintiff, was that they were each to receive a certain fee of \$1,000 each; that this contract was subsequently changed, and instead of the said certain fee, they were to have each the sum of \$2,000, in the event of their succeeding in obtaining a verdict in favor of the will; and upon the defendant's testator, who was named as executor and trustee in said will, getting thereby the possession of the estate of the said testator, that the said sum of \$2,000 to the said Swann and the plaintiff, was to be paid contingently upon the said defendant's testator getting possession of the estate of the said Cramphin, and to be paid out of the estate.

The defendant then prayed the Court to give the following instructions to the jury:

1st. Upon the evidence, the defendant by his counsel prayed the Court to instruct the jury, that if the jury shall find that the compensation claimed by the plaintiff of the defendant was according to

the agreement of the parties, to be paid out of the estate of the said Thomas Cramphin, in the hands of the said George Calvert; if the jury shall find that such agreement was made, then the plaintiff is not entitled to recover the same from the present defendant, the personal representative of the said George Calvert, and the verdict of the jury must be for the defendant.

2nd. If the jury find from the evidence that the sum of two thousand dollars, which was paid to the plaintiff on the 12th December, 1832; if the jury find it was paid, was according to the contract between the parties to be paid upon the contingency of the final decision of cause in favor of the will of Thomas Cramphin, then the plaintiff was entitled to no additional compensation, and the verdict of the jury must be for the defendant.

But the Court, [STEPHEN, C. J., KEY and DORSEY, A. J.] refused to give the instructions prayed by the defendant's counsel, and instructed the jury as follows:

*If the jury find from the evidence that the sum of two thousand dollars which was paid to the plaintiff; if the jury **112** find it was paid, was according to the contract between the parties, to be paid upon a finding of the issues by the jury in favor of the establishment of the will in Montgomery County Court, and that such issues were found by the jury in favor of the will, either of their own accord and free will, or by direction of the parties under a compromise, after the cause had been carried to the Court of Appeals and sent back for a new trial under a *procedendo*, that then the defendant's intestate was personally bound to pay the stipulated contingent fee of two thousand dollars, and such additional compensation as the jury may find the plaintiff's professional services were worth for trying and conducting the case in the Court of Appeals.

If the jury shall find from the evidence that the compensation claimed by the plaintiff from the defendant was to be paid in the event of the jury finding a verdict upon the issues in favor of the establishment of the will, in which the defendant's intestate was appointed executor, and that the verdict was found by the jury in favor of the will, either of their own free will and accord, or by the direction of the parties under a compromise, that then the defendant's intestate was personally bound to make the compensation stipulated, and the defendant is answerable for the same, if it has not been paid.

To the giving of which instructions, and to the refusal of the Court to give the instructions as prayed by the defendant's counsel, the defendant excepted.

5th Exception.—After the evidence in the preceding exceptions had gone to the jury, and which it is agreed shall form a part of this exception, the defendant, for the purpose of enabling the jury to estimate the value of the plaintiff's services for the argument of the case affecting the validity of the will of Thomas Cramphin in the

Court of Appeals, and for the purpose of showing that the jury might not allow as much therefor upon the *quantum meruit*, as the estimate placed thereupon by other witnesses examined in the cause on part of the plaintiff, offered to prove by a competent witness, that

113 *Reverdy Johnson, Esq., an attorney of the Court of Appeals, argued the same case there, together with and as an associate of the plaintiff, and then was about to prove by the same witness the amount of the fee which the said R. Johnson received from the defendant's testator for the said argument in the Court of Appeals, as a circumstance to assist the jury in fixing the amount of compensation to be allowed the plaintiff for the same service. But upon an objection made to the said proof by the plaintiff's counsel, the Court would not suffer it to go to the jury; and to the refusal of the Court to suffer the said evidence to go to the jury, the defendant excepted.

6th Exception. Upon the testimony stated in the several bills of exceptions, and which it is agreed shall be a part of this exception, the defendant by his counsel prayed the Court to instruct the jury, that if the jury should be of opinion from the evidence, that by the terms of the contract between the plaintiff and defendant, the plaintiff was bound to prosecute to a successful issue the controversy then pending in the Orphans Court of Montgomery county, and has been paid the two thousand dollars, the contingent fee, then the plaintiff is not entitled to claim any further compensation for his services proved to have been rendered as aforesaid in the Court of Appeals, but the Court refused to give the instruction asked as aforesaid; to which refusal the defendant excepted.

7th Exception. In the further progress of this cause, and after the evidence in the previous exceptions had gone to the jury, which by agreement shall make a part of this exception, the plaintiff further to maintain the issues joined on his part, proved by Z. C. Lee, Esq., that he was one of the counsel employed by the testator of the defendant, to defend the will of the late Thomas Cramphin. That according to the original contract between the said defendant's intestate and his counsel, consisting of himself, Mr. Swann and the plaintiff, the said Swann and the plaintiff were each to receive a certain fee of \$1,000, and the witness a similar fee of \$750. That this contract was subsequently changed, and that by the substituted con-

114 tract, Mr. Swann and the plaintiff was each to receive * \$2,000 contingent upon the event of the finding of a verdict by a jury in favor of the will, and that the witness was to receive a fee of \$1,500, contingent upon the same event.

And the plaintiff further proved that at the November Term of the Montgomery County Court, a jury of that county found a verdict in favor of the will; that there being at that time no law which authorized an appeal to the Court of Appeals, by which the opinions pronounced by the County Court in the progress of the said trial,

could be revised, although exceptions were taken by the parties to many of the opinions of the Court; that immediately upon the rendition of the said verdict, a motion was made by the parties who contested the will for a new trial, which motion was not disposed of during the then term of the County Court, which closed the day after the verdict, and which was not disposed of when the Act of Assembly of 1832, ch. 208, was passed by the Legislature.

The plaintiff then further offered evidence, that though the motion for a new trial was not disposed of when the said law passed, yet according to the recollection of the witness, it was disposed of and overruled by the County Court before the case was carried to the Court of Appeals. And it was further proved, that the case was carried to the Court of Appeals, and the judgment of the County Court reversed by the Court of Appeals at June Term, 1833.

And thereupon the following instructions were prayed by the counsel of the respective parties:

The plaintiff asked the following instructions to the jury:

If the jury shall believe from the evidence that the contract as existing between the plaintiff and the defendant's testator, in November and December, 1832, was that the said plaintiff was to receive from the said testator the sum of two thousand dollars, as a fee in case the verdict of the jury should be in favor of the will on the issues then pending in Montgomery County Court, and that the verdict of the jury was in fact in favor of the will on said issues, and the said sum of \$2,000 was then paid to the plaintiff by the defendant's testator, in fulfilment and execution of said contract, and that said plaintiff subsequently rendered other and further services for said defendant's testator, at his instance and request, for which he has not been compensated, then the jury may find for the plaintiff such amount as they shall believe from the evidence the plaintiff reasonably deserved to have for such compensation. 115

The defendant by his counsel objected to the Court's granting the said instructions, but prayed the Court, in case they should grant the same, to add thereto the following modification:

That if the jury should find from the evidence, that the contract between the plaintiff and the testator of the defendant, upon which the sum of \$2,000 was to be paid, only entitled the plaintiff to receive the said sum upon obtaining such a verdict in favor of the will, as would procure its admission to probate in the Orphans' Court, then the plaintiff was not entitled to the said sum of \$2,000, until such a verdict was rendered; and the plaintiff in that event can only recover such reasonable compensation as the jury may think he was entitled to, for the argument of the case in the Court of Appeals.

To this modification the plaintiff moved the following addition, but that as the law stood, at the time of the making of the said contract and its execution by the parties respectively, no appeal or writ of error was allowed to the Court of Appeals, and that the law

subsequently passed in 1832, gave for the first time a right of appeal, under and in consequence of which, the said verdict and judgment thereon was reversed and set aside by the Court of Appeals, and that independently of said law, said verdict was a final termination of said issues, then the contract between the said plaintiff and the defendant's testator, is to be expounded with reference to the law as it stood when it was made by the parties, and the services imposed on and performed by the plaintiff in consequence of said law, and subsequent to its passage, at the instance and request of defendant's testator, are not within the contract and provided for by it.

To which the defendant moved this further addition, "that if the jury find, that at the time the sum of \$2,000 was paid the plaintiff, the motion for a new trial had not been disposed of, then the verdict referred to was not a final verdict."

116 * And to this, the plaintiff moved this further addition, that the said verdict became a final verdict afterwards, and before the appeal was taken to the Court of Appeals.

The Court gave these instructions, with their several modifications and additions; and to the giving of each and all of them, with their several modifications and additions, the defendant excepted.

The jury found a verdict for the plaintiff in the sum of \$2,000, and the defendant appealed to this Court.

The cause was argued before ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

J. Johnson and *A. O. Magruder*, for the appellant.

Reverdy Johnson and *T. G. Pratt*, for the appellee.

ARCHER, J. delivered the opinion of this Court. I am directed by the Court to say that they approve of the opinion expressed by Judge DORSEY on all the exceptions in this case, except on the third and fifth exceptions of the appellant.

I am further directed by a majority of the Court on the third exception, to say that they think the Court below were right in the opinion by them expressed in this exception.

This Court has, heretofore decided, that facts proved on a former trial by a deceased witness are admissible on a second trial of the same case. They would only be rejected on the presumption, that facts were proven on the first trial which were inadmissible as evidence. This we think we cannot intend; but the reasonable presumption is, that such facts were alone proved as were admissible, and it was proper the Court should act on this presumption, upon the offer of the evidence, until the contrary appeared.

On the fifth exception the Court are divided. Those of us who maintain that the evidence offered as to what sum was paid to Mr. Johnson was inadmissible, think that what was paid to or demanded by one attorney, was not evidence in the cause. We cannot judi-

cially know the standing of any one member of the bar, or the circumstances under which he was paid, or demanded a given sum for his services. What is the * usual and customary compensation for services of the like kind is admissible testimony, but **117** what was paid to any particular individual, standing *per se*, is in our opinion inadmissible.

DORSEY, J. delivered the following opinion: Differing in opinion with a majority of the Court on some of the bills of exceptions, I proceed to state my own views of this case.

Whether the Court below erred or not, in rejecting the testimony taken under the first commission issued in this cause, is a question not before us for decision, on the present appeal.

Our first inquiry is, was there error in the County Court's admitting the testimony under the second commission, to go to the jury? For its rejection various reasons have been assigned; as well in respect to the time and manner of its issue, as of its execution. It is asserted in the argument for the appellant that it was ordered on the same day that it was applied for; and that no opportunity was given to the appellant to name and strike commissioners. If this assertion be true, it does not satisfactorily appear to me by the record before us. The proof of what transpired in the Court below in relation to the issuing of the second commission is not presented to us, as it is in relation to the first. In regard to the latter, it was proved by competent testimony, that it was applied for by the plaintiff on the 17th of October, 1838, and that on the same day it was ordered to four commissioners named by the plaintiff. But as to the second commission; on the day on which it was applied for; of the number of days which intervened between such application and the naming of commissioners by the plaintiff; and the order for the issuing of the commission, the record furnishes us no definite information. All that we can there learn upon the subject is, that Prince George's County Court sat on the first Monday of April, 1839. That the return to the first commission was made to it at that term; and that a jury was then sworn, and a juror withdrawn; and "whereupon" it was "ordered by the Court, on motion of the plaintiff by his counsel, that commission issue to take * depositions in this cause, **118** directed to Joseph H. Bradley, Philip R. Fendall, James M. Carlisle and James Hoban, Esquires, of the District of Columbia, which said commission accordingly issues to the said commissioners, as ordered by the Court." Thereupon, &c., the cause was continued. Whether these commissioners were exclusively named by the appellee, or were constituted by both parties having exercised the right of striking, the record gives no means of ascertaining. Nor does the order of the Judge upon the subject, furnish any definitive evidence upon this question. After giving the titling of the cause, it is in these words: "Commissioners in the case, Joseph H. Bradley, Philip

R. Fendall, James M. Carlisle and James Hoban, of the District of Columbia. Let the commission issue as prayed, May 27th, 1839." From the length of time which elapsed between the commencement of the term and the date of the Judge's order, in the absence of all proof to the contrary, it is fair to presume either that the appellant did name and strike commissioners, or that after reasonable notice he failed to do so, and the phraseology of the order rather repels than sanctions the presumption, that, as soon as the motion was made, the commission was directed to issue to the commissioners named by the appellee. Had such been the action of the Court, their order, instead of assuming the shape it did, would have been couched in language like the following: "on motion of the plaintiff ordered, that commission issue to the commissioners by him named." The motion of a suitor seeking a commission to take testimony, is not that a commission issue for that purpose to A, B, C and D, but that a commission issue to take testimony; naming the place to which he wishes it to be addressed. Whereupon the Court gives the usual order for naming and striking commissioners. How long this motion was made before the Court's order of the 27th of May, does not appear; but in the absence of all proof to the contrary, judicial courtesy requires us to presume, that in issuing this commission the County Court discharged its duty according to its rules and practice regulating the exercise of such authority. And in this presumption

119 * we are fortified by the fact, that no proof was offered of the non-conformity of the Court in this respect, as was attempted to be shown as regards the first commission. Neither does it appear that at the trial below it was made a distinct ground of objection to the testimony under the second commission, as it was to the first; that "the said commission issued to commissioners named exclusively by the plaintiff, without allowing time to the defendant to name any on his part." As far as this objection is concerned, therefore, I think the County Court did not err in permitting the testimony under the second commission to go to the jury.

The next objection to the evidence in question is, that it was executed in the State of Virginia, in which the commissioners had no authority to act. And in support of this objection the cases of *Bondereau and al. vs. Montgomery and al.* 4 Wash. C. C. R. 186, and *Lessee of Rhoades and Snyder vs. Selin and al.* 4 Wash. C. C. R. 715, have been relied on. But those cases are not analogous to that now before this Court. There by the terms of the commissions they were to be executed at designated places; and having been executed elsewhere, they were suppressed by the Court. In the commission under consideration, there is no designation of the place of its execution. The power of selecting it is confided to the sound discretion of the commissioners, and of its exercise on this occasion, the appellant has no right to complain. That the commission was executed at a private house, detracts nothing from its validity. And in my opinion it

does sufficiently appear to have been executed at the time and place mentioned in the notice. In answer to the fifth objection, that "the time allowed by the notice was too short," it has been urged, that this being a foreign commission, no notice to the parties of the time and place of its execution was requisite. And in support of this doctrine, the cases of *Owings vs. Norwood*, 2 H. & J. 99, and *Lair vs. Scott*, 5 H. & J. 438, have been cited; and I think fully sustain it. In the former of these cases the Court decided that "in executing foreign commissions, notice is not necessary; but time should be given, that the opposite party might exhibit cross interrogatories;" and in the latter it is fully settled that in executing foreign commissions, no notice of the time and place of so doing need be given to the parties to the suit. All the notice required is, that of the interrogatories sent out with the commission; actual or constructive notice should be given to the opposite party, in time for him to exhibit cross interrogatories before the transmission of the commission. It is true that it is not perfectly obvious that the opinion of the learned Judge who decided the case of *Boreing vs. Singery*, is in perfect harmony with the above recited extract from the opinion of the same Judge, delivered in the case of *Owings vs. Norwood*. In *Boreing vs. Singery*, the defendant offered in evidence a commission issued at his instance, the return to which, "after setting forth the meeting of the commissioners, and their having taken the deposition of a witness in answer to certain interrogatories," concludes by the commissioners certifying that "the foregoing interrogatories were taken at the instance of Joshua Stevenson, on his asserting that the plaintiff had knowledge of his coming and intention of having this commission executed." In support of this statement made to the commissioners, no evidence was offered, and it would appear from the report of the case that no interrogatories were filed and sent with the commission; nor any notice given the plaintiff of the interrogatories propounded to the witness; nor was time or opportunity afforded him filing cross interrogatories; nor any notice given him of the time and place of executing the commission. Upon the objection being raised to the admissibility of the deposition taken, on the ground that legal notice had not been given to the plaintiff of the time of executing the commission, the learned Judge, above referred to, who delivered the opinion of the Court below, said, "this case is not similar to the case of *Norwood vs. Owings*. In that case the commissioners certified that they had given notice; but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given. The Court are of opinion, that the commission and return are not legal evidence." That the Court were right in rejecting the testimony offered, is too obvious to admit of discussion. It was affirmed on appeal to this Court. It is true the learned Judge was mistaken as to a fact

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which he stated in reference to the case of *Norwood vs. Owings*, viz: that "the commissioners certified that they had given notice." The return of the commissioners certified no such fact. But in that case the defendant, whose behalf the commission issued, filed in Court his interrogatories, (a copy of which was annexed to the commission,) and ample opportunity was given to the plaintiff to have filed cross interrogatories. In the interpretation given by the counsel of the appellee to the opinion of the learned Judge in *Boreing and Singery*, he is perhaps misunderstood. He did not mean, as is imputed to him, to impugn the principle, so distinctly announced by him in the case of *Owings vs. Norwood*, in reference to the execution of foreign commissions; but speaking in reference to the commission before him, where no notice of the interrogatories, or opportunity to exhibit cross interrogatories had been given to the plaintiff; he, in rejecting the testimony, says, "but in this case it does not appear, by the return of the commissioners, that they had given any notice, or that proper notice had been given;" thus it may be inferred, confirming and extending, rather than overruling the doctrine he had so emphatically laid down in *Norwood vs. Owings*, to which he most probably alluded in his alternative reason assigned, "or that proper notice had been given."

In the case before us, however, notice of the time, place, &c., of executing the commission was given by the commissioners to the appellant; and I do not regard the shortness of the time complained of an adequate ground for suppressing the testimony taken under the commission. In the appellant's first exception, therefore, I see no ground for reversing the judgment of the County Court, rendered in the case before us.

On the second bill of exceptions, I think the County Court erred. Having permitted a witness to state the contents or effect and operation of a written instrument, without producing it, notwithstanding the appellant's objection to the *admissibility of the testimony. The testimony, thus given, might have had a material influence on the minds of the jury in forming their verdict.

I cannot consent to affirm the act of the County Court in admitting under the circumstances in which it was done, the witness to give evidence of what facts were proved by a certain Benjamin S. Forrest, a deceased witness, examined in a former trial of this cause. The testimony being objected to, before the Court could determine that it was admissible, it must be satisfied that it was not immaterial and irrelevant to the issue in the cause, of which it was wholly incompetent to judge, without a statement of the facts of which the proof was offered. The objection being overruled, and the evidence admitted without any such statement, I do not see how this Court can determine that it was admissible, without knowing what it was. When testimony is objected to, before it can be submitted to the jury, the party offering it, must show its competency.

or it must be made to appear to the Court that it is not immaterial or irrelevant. His obligation to do so, is in nowise changed, by proof of the fact, that it was given in evidence to a jury in a former trial of the same cause between the same parties. Reasons, almost without number, may be assigned, why a party not objecting to incompetent testimony on a first trial, should prefer his objections on the second. His omission or waiver of his rights in a first trial, do not impair or restrain his exertion of them in the second. A principle of striking analogy to that now in question, was decided by the Court of Appeals in the case of *Ragan vs. Gaither*, 11 G. & J. 472, where the judgment of the County Court was reversed, because two deeds referred to in the bill of exceptions were not inserted at length, that the Court might judge of their legal effect and operation. By admitting the testimony offered to go to the jury, the Court in fact decide that the facts offered to be proved, were pertinent and material to the issue, without the semblance of any knowledge of what the facts were.

I see no sufficient ground for the reversal of the judgment of the County Court, either for its refusal to give the defendant's
 *instructions as prayed, or for the giving of the Court's in- **123**
 structions as set forth in the defendant's fourth bill of exceptions. Notwithstanding the facts put to the finding of the jury by the appellant's first instruction in this bill of exceptions, the jury were not bound to find for the appellant. If the appellant's intestate did contract with the appellee to pay him for his services out of the estate of Thomas Cramphin, in the intestate's hands, and failed to do so, his contract was broken; he was personally bound for its performance, and the present action, for the breach thereof, might well be sustained against the appellant, his personal representative. So also as to the second instruction prayed for by the appellant; although the \$2,000 paid to the appellee, was, according to the contract between the parties, to have been paid upon the contingency of the final decision of the cause in favor of the will of Thomas Cramphin, yet the jury were not thereby bound to find a verdict for the defendant, because there was other evidence before the jury legally sufficient to warrant them in finding that, by an additional or subsequent agreement between the parties, the appellant's intestate promised to pay to the appellee a further compensation for the services rendered, or a portion thereof. With the two instructions given by the Court to the jury in this exception, I see nothing of which the appellant has such ground of complaint as would require of this Court the reversal of the judgment.

I cannot concur with the County Court in the rejection of the testimony offered by the appellant in his fifth bill of exceptions. No contract for a stipulated compensation for the services rendered having been proved, the appellee's right to recover was upon the ground of a *quantum meruit*. The estimate which the jury, by their

verdict, should place on the services for which compensation was sought, was the price at which like services, by counsel of the same eminence, are ordinarily obtained. How then can the value of such services be ascertained so satisfactorily, as by proving what the same party or other persons paid for similar services. Suppose that a witness were produced, who proved that the ordinary * compensation

124 tion allowed to such counsel for such services was a specified sum by him stated. Upon what knowledge of facts must his statement, to be evidence at all, be necessarily founded? Why that A, B, C and D, &c., under like circumstances for like services paid, or were required to pay, that, or nearly that sum of money. If then it be admissible to show what others paid, under similar circumstances, is it not competent for the appellant to prove the sum paid by him for services identical, and in the same cause, to other counsel, who, for aught that appears in the record before us, may have been of equal professional ability and eminence with the appellee himself. Indeed the circumstances under which the proffered witness was enlisted in the cause, repel the idea of his great professional inferiority to the appellee, with whom he was associated solely for the purpose of trying the case in the Court of last resort. It is not the usage of clients, on such occasions, to call in as associate counsel, a member of the bar of inferior standing to him who tried the cause in the Court below. But, if contrary to this usage, the appellant's testator had done so, it was competent for the appellee to have shown it by evidence before the jury.

It has, however, been insisted, that the charges of lawyers are so wholly dissimilar in amount; the value of their services so disproportionate, that the mode suggested of ascertaining the value of their services, is wholly inapplicable. If this be true, the same may be predicated, in a greater or less degree, of all other professions, arts and trades. What other measure of value can you in reason and justice apply to services rendered by counsellors at law. It will not, I presume, be contended, that where no contract for specific compensation has been entered into, the client is bound to pay whatever charge his counsel may see fit to make for his services. When the common law of England, in relation to the fees of counsellors at law, was determined to be inapplicable to the State of Maryland, and that in a *quantum meruit* they might recover for professional services rendered; that decision necessarily drew with it

125 the standard I have mentioned, for the * ascertainment of the value of such services. The materiality and relevancy of the testimony offered, was too obvious to require from the counsel an assurance to the Court that it would so appear in the progress of the cause.

I concur with the County Court in their refusal of the defendant's prayer for an instruction to the jury, which forms the basis of his sixth bill of exceptions. Although the jury might find that by the

terms of the contract the appellee was bound to prosecute, to a successful issue, the controversy then pending in the Orphans' Court of Montgomery County, and that the contingent fee of two thousand dollars had been paid to him; yet the County Court were not authorized to instruct the jury, that the appellee was not entitled to claim any further compensation for his services proved to have been rendered as aforesaid in the Court of Appeals; because in doing so, the instruction would have excluded, from the consideration of the jury, all the testimony offered by the appellee, to show that the appellant's intestate had promised to make the appellee an additional compensation for his services, besides the contingent fee of two thousand dollars, of which there was testimony offered, legally sufficient to have been left to the jury; and from which the jury might have found the existence of such agreement for additional compensation, if they regarded the testimony sufficient, in point of fact, for that purpose. Such an exclusion of evidence would have been an unwarrantable invasion of the province of the jury, which the Court below very properly refused to perpetrate.

To the granting of the plaintiff's prayer, for an instruction to the jury, as it stood in the defendant's seventh bill of exceptions, unmodified by either of the parties, I can see no reasonable ground for objection. And the defendant cannot assign for error, the results of any of his own modifications or additions to the prayer of the plaintiff. If there be error then, for which the judgment should be reversed, it must be found in the additions made by the plaintiff to the instruction as modified and amended at the defendant's instance. And in the adoption of each of those additions I think there is such * error as calls for the reversal of the judgment before us.

The first of these additions, (if not so in express terms, would **126** in all probability, have been so understood by the jury,) called on the Court to say that for all services performed by the plaintiff, at the instance of the appellant's intestate, in consequence of the Act of 1832, granting an appeal from the trial of the issues in Montgomery County Court to the Court of Appeals, he was entitled to recover of the appellant a reasonable compensation in addition to the contingent fee of two thousand dollars. This addition to the defendant's modification might with propriety have been hypothetically granted by the Court to the jury; that is the jury might have been instructed that such was the law, provided they found, as contended for by the appellee, that by the contract between the parties, the contingent fee of two thousand dollars was to have been paid him for his successful trial of the issues then pending in Montgomery County Court. But suppose the jury had been of opinion, as I have said they had the power to be, that the appellant's version of the contract was the true one; and that the two thousand dollars was only to have been paid upon the successful termination of the controversy about the will, and the appellant's intestate being put into possession of

Cramphin's estate; could the Court then have instructed the jury as required by this first addition to the defendant's modification of the plaintiff's prayer? unquestionably not.

In the grant of the instruction asked for in the plaintiff's second or further addition to the instruction to be given to the jury, the Court undertook to decide a matter of fact, which the jury only were competent to determine. The County Court, as called on to do by the plaintiff, determined that the motion for a new trial was decided or disposed of by the Court, before an appeal was taken to the Court of Appeals. Of this fact, no record evidence was offered; but the proof was wholly oral; of the credit due to which the jury only were competent to judge. In withdrawing from the jury the right to judge of the credibility of the witnesses and the truth of their statements, I think the County Court erred.

127 * I concur with the County Court on the appellant's first, fourth and sixth bills of exceptions, but dissenting on the second, third, fifth and seventh, I think, its judgment should be reversed and a *procedendo* awarded.

Judgment reversed, and procedendo awarded.

DAVID WHITEFORD vs. CORNELIUS BURCKMYER and ESTELL L. ADAMS.—December, 1843.

It is a sound rule that before a party can discredit a witness by proof of his having made statements at variance with his testimony, the witness whom it is intended to impeach, should first be afforded a full and fair opportunity to recollect, by calling his attention to dates, names, or other attendant circumstances, as connected with the matter about which he is to be charged with having made different statements: but in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, a party will not be allowed to violate any positive rule of evidence. (a)

It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest for the purpose of disproving it by another witness; nor is it proper to ask a witness, with the same view, of a fact proper in itself to be proved in the cause, if the only knowledge of such fact has been obtained through a source which the rules of evidence, do not recognize as competent. (b)

It is a rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy. (c)

(a) Approved in *Matthews vs. Dare*, 20 Md. 269; *Higgins vs. Carlton*, 28 Md. 138. See *Franklin Bank vs. Nav. Co.* 11 G. & J. 20, note (c); *Waters vs. Waters*, 35 Md. 532.

(b) See *Goodhand vs. Benton*, 6 G. & J. 323; *Sloan vs. Edwards*, 61 Md. 105.

(c) Affirmed in *Nusbaum vs. Thompson*, 11 Md. 563; *Hagan vs. Hendry*, 18 Md. 190; *Jameson vs. Hall*, 37 Md. 232; *Roemer vs. Jaecksch*, 39 Md. 590.

Where a question proposed to be asked of a witness involves several distinct members, the Court is not bound to select from it such members as might be admissible, if unaccompanied by the others with which it is connected, and say that such particular portions of the testimony are proper. (d)

A letter written by the plaintiffs in the cause to a third party, unaccompanied with other proof, is like their verbal declarations to him; and where it was intended to establish that the letter contained a certain enclosure, the party to whom it was addressed, and who received it, being a competent witness, is the best evidence to establish the fact.

In an action by an endorsee against the endorser of a bill of exchange, the drawer is a competent witness to prove that he had received notice of non-acceptance, and his declarations to a third person are not therefore the best evidence of that fact.

Where an agency is established, it is generally true, that an admission of an agent while in the execution of his agency, is admissible to charge his principal.

* To entitle an appellant to a reversal for error in instructions he must make good all the propositions contained in his motion, how-
ever numerous they may be. 128

The necessity for plain and satisfactory proof as to the time of service of notice of non-acceptance, where that is material, has always been insisted on; it may be proved by circumstantial testimony, but the circumstances must point not to notice at some time, but to notice on the day when the party had a right to expect and receive it. (e)

Where several witnesses are examined, the testimony of any one of them may be selected from the mass of proof with which it is connected, and made the subject of an instruction.

A party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him. (f)

Under an allegation of notice of protest to an endorser in the declaration, the plaintiff may show a waiver of the right by the defendant. (g)

It is the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the Court distinctly upon it. (h)

(d) Approved in *Carroll vs. Granite Co.* 11 Md. 407.

(e) Approved in *Nailor vs. Bowie*, 3 Md. 257.

(f) See *Beck vs. Thompson*, 4 H. & J. 428, note; *Duvall vs. Farmers Bank*, 9 G. & J. 21.

(g) Approved in *Whitridge vs. Rider*, 22 Md. 567.

(h) Approved in *Day vs. Day*, 4 Md. 269; *Wilson vs. Smith*, 10 Md. 75; *Inloe vs. Bank*, 11 Md. 185; *Birney vs. Telegraph Co.* 18 Md. 856; *Johnson vs. Harvey*, 30 Md. 261; *Winner vs. Penniman*, 35 Md. 168. Examined in *Peterson vs. Ellicott*, 9 Md. 61; *Adams vs. Capron*, 21 Md. 205; *Crawford vs. Beall*, 21 Md. 234, 237; *Fusting vs. Sullivan*, 41 Md. 171. A party has the right to segregate any portion of the facts of a case from the whole body, and ask the instruction of the Court on them. It is for the other party, if he desires it, to ask the opinion of the Court on the whole testimony. *Day vs. Day*. But such instructions will not be granted if likely to mislead the jury. *Wilson vs. Smith*. The instruction asked must be in aid of a theory which embraces all the facts material to establish or defeat the right in controversy. *Adams vs. Capron*; *Peterson vs. Ellicott*. When the facts are so

If the opposite party believes that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist, nor annexing modifications to it against the consent of the party moving it. (i)

Where the holder of a bill of exchange, in Baltimore, sends it to a distant place, as Charleston, S. C. for acceptance, and it is not accepted, the plaintiff, in an action against an endorser, must show presentment for acceptance and refusal, and notice duly transmitted from Charleston to the endorser by mail, or if the notice to the endorser was sent by mail to the holder in Baltimore, that he delivered it within one day after the arrival of such notice in Baltimore, and the burthen of proof is on the plaintiff to show such notice given. (k)

Where the language of an instruction is calculated to bias the mind of the jury upon a contested matter of fact, it is error.

Where the entire and exclusive interest in a bill is vested in the holder thereof, he cannot institute an action upon it in the name of another party.

Possession of a note endorsed in blank will enable the party having it to maintain suit, except *mala fides* be proved. (l)

segregated, the conclusion arrived at in the instruction must be consistent with the truth of the other facts offered in evidence. In other words, if found to be true, they must support the theory of the prayer, *non obstante* the truth of other facts offered in evidence: for, if these latter, while not inconsistent with the truth of the facts upon which the instruction is based, would in conjunction with them establish in law a different theory and a different result, the prayer ought not to be granted. *Wiener vs. Penniman*. There are two classes of instructions which are not to be confounded with each other; one, where it is sought to obtain the instruction of the Court upon the legal effect of a particular instrument, or a particular fact, or, it may be, of a combination of facts, in which the party desiring the instruction may sever them from the mass and submit them to the Court, taking care to deduce the proper legal conclusion from the premises. In such a case the opposite party has no right to modify or change, because both the facts and the law are right. The other class of prayers is where all that is offered in evidence on either side must constitute the basis of the prayer, if the party asking it seeks to establish a legal proposition, conflicting with his adversary's proposition depending on the proof of the same facts. *Crawford vs. Beall*, *supra*. When the evidence relied on to sustain the facts which are the basis of a prayer is in conflict with other evidence offered by the opposite party, in relation to the same facts, the prayer should not be refused merely because it does not mention or notice the opposing evidence. *Williams vs. Woods*, 16 Md. 222. When there is conflicting evidence in relation to the same matter, either party has a right to ask an instruction to the jury as to what would be the legal effect of their finding to be true the facts which are made the ground work of the prayer. *Ibid.* Cf. 2 *Poc's Pldg.* sec. 801.

(i) Approved in *Keener vs. Harrod*, 2 Md. 74. See *Higgins vs. Carlton*, 28 Md. 189.

(k) Affirmed in *Tate vs. Sullivan*, 30 Md. 470. See *Philips vs. McCurdy*, 1 H. & J. 123; *Chase vs. Taylor*, 4 H. & J. 36, to the same effect.

(l) Approved in *Burckmyer vs. Whiteford*, 6 Gill, 16; *Merrick vs. Trustees*, 8 Gill, 71; *Ellicott vs. Martin*, 6 Md. 516; *Kunkel vs. Spooner*, 9 Md. 475;

Courts of justice will never enquire in such cases, whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*.

Blank endorsements may be filled up at the moment of trial. (m)

If a bill has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee.

A bill payable to bearer, or a bill payable to order endorsed in blank, will pass by delivery and bare possession, is *prima facie* evidence of title.

If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name, or if the * endorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger. **129**

Since the Act of 1825, ch. 35, any holder with a blank endorsement may now sue in his own name, but that Act cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner. (n)

It is a settled principle, that the Court will not instruct the jury that there is no evidence of a material fact, if there be any evidence whatever tending to prove it. (o)

An admission of notice by a defendant endorser is evidence, on which the jury may find notice, in due time, and in due form.

An action will lie upon notice of presentment, and non-acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill.

The holder is not bound to present a bill payable on a certain day after date, for acceptance, unless he be an agent to get it accepted or to collect it. If it be presented, and acceptance is refused, it is dishonored, and immediate notice must be given to the parties who are to be charged.

The Act of 1837, ch. 253, was designed to extend the credit which, by the courtesy of commercial nations, had been given to the certificate of a notary public.

The certificate of a public notary had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment.

The Act of 1837, ch. 253, extends this doctrine as well to inland as to foreign bills or notes, as to notice sent or delivered in the manner stated in the protest. (p)

Long vs. Crawford, 18 Md. 226; *Dunham vs. Clogg*, 30 Md. 292; *Condon vs. Pearce*, 43 Md. 94; *Hymer vs. Ijams*, 56 Md. 475.

(m) See Rev. Code, Art. 35, sec. 8.

(n) Cited in *Kunkel vs. Spooner*, 9 Md. 475; *Elliott vs. Chesnut*, 30 Md. 565. See Rev. Code, Art. 35, sec. 8; *Bowie vs. Duvall*, 1 G. & J. 60, note. Where the entire and exclusive interest in a bill of exchange or other negotiable chose in action is vested in the holder thereof, he cannot institute an action upon it in the name of another party. Assignments of other choses in action, not negotiable, entitle the assignee to sue in the name of the assignor, for the use of the assignee, or in his own name by virtue of Code, Art. 9, sec. 1. *Hampson vs. Owens*, 55 Md. 583.

(o) See *Cole vs. Hebb*, 7 G. & J. 15.

(p) Cited in *Weems vs. Farmers Bank*, 15 Md. 289; *Reier vs. Strauss*, 54 Md. 235. See Rev. Code, Art. 35, secs. 6, 7. But the Act does not constitute the certificate of the notary, any evidence of other collateral or independent

It is not necessary that notice of protest be sent by mail, and a party is not bound to be more expeditious or certain than the mail.

Notice, if sent by mail, need not be enclosed to the address of the party to be charged. If it be received by him in due time, he cannot object to the mode of conveyance.

Where the protest does not show notice of dishonor transmitted to the party to be charged, that fact may be supplied by other proof. (q)

The rule which excludes hearsay evidence is as obligatory in repelling and discrediting testimony, as in conformatory.

The declarations of a person who is a competent witness cannot be offered in evidence merely because they are in reply to the testimony of other witnesses.

A party may group into one instruction as many and as complicated facts as he pleases, to assume his testimony will prove, and ask the Court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such as it is not competent for the jury to act on, he must fail in his application.

Where the instruction given, authorized the jury to find one of three alternate and distinct propositions of fact, without saying which, it is error.

130 It * would be impossible for them to ascertain whether they were thereby authorized to find the first, second or third alternation.

If counsel present to the Court a complicated and involved statement, which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the Court should refuse to give a direction in the terms asked for. (r)

APPEAL from Baltimore County Court. This was an action of assumpsit, brought on the 9th October, 1840, by the appellees against the appellant, who pleaded *non assumpsit*. At the trial the following exceptions were taken:

1st Exception. The plaintiffs to support the issue on their part offered in evidence to the jury the following bill of exchange and protest:

"1,500. W. B. Baltimore, 1st January, 1840.

Ninety days after date, please pay to the order of David Whiteford, fifteen hundred dollars, which charge as advised to account of

Your obedient servant,

NICHOLAS U. CHAFEE:

To Messrs. Blum & Cobia, Merchants, Charleston, S. C."

(Endorsed,) D. Whiteford. Pay to order Messrs. C. Burckmyer & Co. Th. Phenix. The last endorsement had been erased before the trial.

UNITED STATES OF AMERICA, *City of Charleston, State of South Carolina*. On the sixth day of January, one thousand eight hundred

facts, which it may contain; especially when such facts are not necessarily within the personal knowledge of the notary, or are of such a character that they could not be established by his testimony if he were produced as a witness. *Weems vs. Farmers Bank*.

(q) Approved in *Nailor vs. Bowie*, 3 Md. 258.

(r) Approved in *Iron Co. vs. Scally*, 27 Md. 608.

eight hundred and forty, &c., at the request of Messrs. C. Burckmyer & Co., I, A. C. Smith, notary public, exhibited the original draft or bill, a copy thereof on the other side, to Messrs. Blum & Cobia, and demanded their acceptance thereof; to which they replied, we decline accepting for want of advice. I forwarded notices to the drawer and endorsers under cover, to Th. Phenix, Esq., cashier of Western Bank, Baltimore. Therefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the drawer of the said draft or bill, the endorsers and all others concerned, for, &c. Thus protested at the City of Charleston, &c. In testimony whereof, I, &c.

A. C. SMITH, Not. Pub.

* And then proved the hand-writing of the drawer and endorser, and their partnership as stated in the declaration; **131** and proved by Mr. Hall, that he was a clerk in the Western Bank in 1840, and that "N. A., January 11th, 1840," on the books of said bank, is in his hand-writing, and means notice of non-acceptance received on that day, but said witness did not remember either to have received from any one, or delivered to any one, any notice of protest for non-acceptance of the bill upon which this suit is brought. And then offered to prove by Mr. Taylor, that he was the runner of the Western Bank in 1839 and 1840, who, on his examination in chief, stated, that to the best of his knowledge, he had a notice of protest for Whiteford and Chafee, which he took to Whiteford, the defendant, at his store, who told him to take it to Chafee, and that he took it to Chafee's dwelling and gave it to some of the females of the family, Chafee being then absent at his place of business, his distillery; that witness delivered all notices for Chafee at Whiteford's store, either to Whiteford himself, or a clerk in his store; that all but this one were left there. This witness thought, was left in January, 1840; what time in that month he could not say. Witness told Whiteford they were notices of protest for drawer and endorser.

On cross examination, witness stated, that he had not read these notices, nor did he know what their contents were; that he made no memorandum of the time when he left he left them, nor of the fact of doing so.

The plaintiffs then called Thomas Phenix, cashier of the Western Bank, as a witness, who stated, after the bill was returned in October, 1840, he took the bill and protest to Whiteford and asked him for payment; that Whiteford expressed great surprise, and said he had no notice of protest for non-payment. Witness replied, the bank had none either, but you had notice of non-acceptance; to which Whiteford replied, yes, I might have had that, and objected to payment for want of notice of protest for non-payment. Whereupon, the counsel of defendant asked said witness if he had never stated, that he, witness, had given this notice to said Whiteford, who **132** * replied he never had said so. Whereupon, the counsel for defendant proposed to ask said witness, in order to discredit him by

other witnesses, and to show his statements at other times to have been at variance with his evidence now given; whether said witness, after suit brought, had not called upon Whiteford to induce him to settle this bill, and whether said Whiteford did not at that time state to said witness, that he was not liable for said bill, because he had never received any notice whatever of protest, either for non-acceptance or non-payment, and that said witness replied, Mr. Whiteford, you are mistaken, I gave you the notice myself; to which Whiteford rejoined, you never did, nor did any one else. To the admissibility of which question the counsel objected, and the Court [PURVIANCE, A. J.] refused the said question to be put to the witness in the manner above stated. The defendant excepted.

2nd Exception. The plaintiffs and defendant having given in evidence the facts and circumstances stated in the first exception, which it is agreed shall form part of this, the defendant proved that the bill in question was discounted by the Western Bank, and by them transmitted to the plaintiffs, their agents at Charleston, for collection; and also proved that said bill was returned to the bank with the following letter:

Charleston, September 26th, 1840.

To T. Phenix, Cashier.—We herewith return you this protested draft of N. U. Chafee, on Blum & Cobia, for \$1,500.

(Signed,) BURCKMYER & Co.

And also, gave in evidence the following letter, written by order of the bank to the defendant:

Western Bank, September 30th, 1840.

Sir,—Blum & Cobia's note, \$1,500, upon which you are endorser, has this day been returned unpaid, to which you will please attend.

Respectfully, W. B. BERRY.

By order, Th. Phenix, Cashier.

(Endorsed,) Mr. D. Whiteford. Present.

Whereupon, the plaintiff in order to shew an interest in the bill in question in the plaintiffs, or that they were in possession
133 * thereof at the time suit was brought, offered in evidence the following letter, written to the bank:

Charleston, October 7th, 1840.

Mr. T. Phenix, Baltimore. Dear Sir,—Your favor of 30th ultimo and 2d inst. are at hand, returning Chafee's draft on Blum & Cobia, \$1,500. This draft was regularly noted for non-acceptance, and the drawer and endorser furnished with notice of the same. Our young man laid it away in our chest, where it was overlooked; but as Messrs. Blum & Cobia had not, nor have had since, any funds of the drawer, we do not think much of the honor of the indorser who would take advantage of an oversight, when no loss has accrued to him thereby. We presume, according to strict mercantile usage, we are responsible to you, but only when you have proceeded against the draft, and obtained from the parties all you can; the balance, if

any, we will have to make up. We therefore return you the draft, with protest for non-acceptance. For the purpose, however, of settling this unfortunate business, if you can make a compromise with them at once, and yield up a part, we will make up the deficiency at once. We remain yours, respectfully, C. BURCKMYER & CO.

Neither Messrs. Blum & Cobia, or Messrs. Caldwell & Sons, have any property of Mr. Chafee's.

To the admissibility of which, defendants objected, but the Court overruled the objection, and allowed the evidence to go to the jury. The defendants excepted.

3d Exception. The plaintiffs and defendant, to support the issue on their part, having offered in evidence to the jury the facts stated in the previous bills of exceptions, which it is agreed shall form part of this, the defendant called a witness who proved, that Thomas Phenix stated to Mr. Whiteford, the defendant, in a conversation in February, 1841, that he, said Phenix, had served the notice on said Whiteford himself; and also proved that said Phenix was not in Baltimore from the 9th to the 15th January, 1840, and that a letter mailed in Charleston on the 6th January, 1840, would have reached Baltimore on the morning of the 11th of that month. The **134** * plaintiff, in order to corroborate the evidence of T. Phenix, then called Mr. McMahon and Mr. Collins to prove prior statements by Phenix to them, and after suit brought, and before February, 1841, of his conversations with Whiteford, of which he has testified to confirm his testimony in relation to them. To which the defendant objected, but the Court allowed the evidence to go to the jury. The defendant excepted. (This exception was abandoned at the trial.)

4th Exception. The plaintiffs and defendant, having given in evidence the facts stated in the preceding exceptions, which it is agreed shall form part of this, the defendant further proved by two witnesses, that they were clerks of N. U. Chafee, not living in his house, in January, 1840, and that they never saw, knew or heard of any protest, or notice of protest, of the draft now in suit, for either non-acceptance or non-payment, until September or October, 1840. The plaintiffs then offered to prove, that shortly after the time when these notices must have been received, Chafee called at the Western Bank and stated to witness, that notwithstanding the protest for non-acceptance, the bill would be paid at maturity. To the admissibility of which statements by said Chafee, in order to affect in any way the draft in this cause, the counsel for the defendant objected, but the Court overruled the objection, and allowed the evidence to go to the jury. The defendant excepted.

The plaintiffs and defendant having given in evidence the facts and circumstances as stated in the foregoing exceptions, which it is agreed shall form part of this, the defendant then proved what is stated in the foregoing agreement:

It is admitted, that a letter leaving Charleston by the mail of the 7th January, 1840, would have reached Baltimore on the morning of the 11th, before 9 o'clock, and that defendant is, and always has been, a resident of Baltimore, and that the 11th January, 1840, was Saturday. And also, that Thomas Phenix was absent from Baltimore during the 10th, 11th, 12th, 13th and 14th January, 1840, and proved by said Phenix, that he never saw the notices of protest for

135 non-acceptance, and * proved by Berry, Hull and Mason, clerks in said bank, that they never saw said notices, and knew nothing of their delivery. The defendant further proved, that this bill was discounted by the Western Bank, and was by them sent to plaintiffs, their agent at Charleston, for collection, and was returned to said bank in the following letter. (See letter of 26th September, 1840, *ante* 132.) The plaintiff then gave in evidence the following letter from plaintiffs to the Western Bank. (See letter of 7th October, 1840, *ante* 133.) The defendant then proved, that when this draft was discounted, Charleston was paying specie, and Baltimore funds; including notes of the Western Bank, were seven per cent. below specie; that it would cost about one per cent. to transmit specie from Charleston to Baltimore; that drafts in January, 1840, were sold by the plaintiffs in Charleston, on the Western Bank of Baltimore, at three per cent. discount; that is, \$970 in Charleston purchased a sight check on Baltimore for \$1,000. And also proved by Herman Perry, that on the 15th January, 1840, he bought a draft on Charleston in Baltimore, at sixty days, at par. The defendant then proved, that there was a great difference between the price of sight and time drafts; and there was no regular rate of exchange from Baltimore to Charleston; and that one per cent. was a fair rate of exchange on a bill drawn from Baltimore on Charleston; and further proved by T. Phenix that when he discounted said bill, he charged one per cent. over and above the legal rate of interest, as exchange and not as interest or usury. The defendant also proved he had merely endorsed this bill for Chafee's accommodation. It is also admitted, that the testimony as to Chafee's declarations to Phenix was taken, subject to exception as to its admissibility to affect this defendant; but that it was offered in evidence after the evidence offered by the defendant, by Chafee's clerks, to prove that they never saw or heard of any such notice, and to show that Chafee had never received it.

The defendant then made the following prayers to the Court, and the plaintiffs submitted the following modification thereof:

136 * 1. That the defendant in this case being an endorser of a bill of exchange, drawn upon a party in another State, and there protested for non-acceptance, was entitled to strict notice of the presentment of such bill and the protest thereof.

2. That such notice is not sufficient if given by a stranger to the bill, but could only be given by one of the parties to such bill, or by a duly authorized agent of one of the parties to such bill.

3. That a notice given by Mr. Taylor, unless authorized by some of the parties to said bill to give the same, was not sufficient notice.

4. That the evidence given by Taylor is not sufficient to shew that strict notice was given to Whiteford, of the protest for non-acceptance of the bill of exchange in controversy in this suit, and that evidence of a waiver of notice is not sufficient to maintain the present declaration, if the jury believe that Whiteford received no consideration from Burckmyer & Co., the plaintiffs, or from any other person for said bill.

5. The defendant prayed the Court to instruct the jury, that if they believe that a letter leaving Charleston by the mail of the 7th January, 1840, would have reached Baltimore on the morning of the 11th January, 1840, before 9 o'clock; and if they further believe that defendant was always a resident of Baltimore, then plaintiffs are bound to prove that notice of demand on and refusal of acceptance by the drawee, was given to defendant on said 11th January, 1840, or upon the first business day thereafter.

6. That in order to enable the plaintiffs to recover, they must satisfy the jury that a demand of the bill was made of the drawees, and acceptance refused by them, or one of them, and notice thereof sent to the defendant by the first or second mail which left Charleston for Baltimore, after the demand and refusal of acceptance, or if no notice was sent to defendant from Charleston by any of the parties to the bill, nor by the agent of any of them, but the only notice sent from Charleston was transmitted to T. Phenix, the cashier of the Western Bank, then that said Phenix or some agent of said bank, or some * other party to the bill, or some agent of such other party, at some time not exceeding a day after the **137** receipt of such notice by said Phenix, gave notice of such demand and refusal to defendant, and the burthen of proof is upon the plaintiffs to shew such notice given, and unless the jury are satisfied from the evidence, that notice was given to defendant within one day after the arrival of such notices at the Western Bank, plaintiffs cannot recover in this case.

7. If the jury believe that the Western Bank of Baltimore were the holders and owners of the bill on which this suit is brought, at the time it was so brought, the plaintiffs cannot recover in this case, although this suit was brought in their names, by order of the bank.

8. That in order to entitle the plaintiffs to recover, they must show either a demand for payment of the bill from the drawee, and refusal by him to accept, or notice of demand and refusal to defendant, or waiver of such demand and notice.

9. If the jury believe that the true rate of exchange between Baltimore and Charleston was in favor of Charleston at the time this bill of exchange was discounted, that the agreement to take, and taking one per cent. for exchange, over and above the legal rate of

interest, is usurious, and the said bill is void, and plaintiffs cannot recover in this case. (Abandoned at the trial.)

10. That all the testimony offered by the plaintiff, with reference to the acts and declarations of Chafee, are inadmissible to charge the defendant in this cause.

11. That there is no evidence in the cause to shew a proper legal notice of protest for non-acceptance, to the defendant in due time.

12. That in order to entitle plaintiffs to recover, there must be evidence of a demand of payment of the bill, when the bill in controversy became due, and notice of the refusal to pay the same.

13. If the Western Bank, at the time they took the bill of exchange now in controversy, did ask and take a higher rate of

138 exchange than was currently paid for good bills of exchange * on Charleston, it is usury, and the plaintiffs are not entitled to recover. Abandoned at the trial by counsel.

14. That the protest offered in evidence, is no proof of notice of presentment, for non-acceptance and refusal to accept having been duly and legally sent from Charleston to Baltimore.

Qualification by Plaintiff of the Defendant's Sixth Prayer.

"But the fact that such notice was given to the defendant, may be established by circumstantial or presumptive evidence, as well as by direct proof; and the protest for non-acceptance offered in evidence, the proof by the witness Taylor, of the actual delivery of certain notices of protest to the defendant, as stated by said witness, and the conversations of the defendant with the witness Phenix, as proved by said Phenix, furnish evidence from which the jury may infer, that such notice as is above mentioned, was given to the defendant."

The plaintiff then prayed the Court to instruct the jury, that the proof offered by the plaintiff, of the delivery by the witness Taylor, at the residence of Chafee, the drawer of the notices of protest originally taken to the defendant, and of the acts and statements of the said Chafee, in relation to the same, as proved by the witness Phenix, being offered in reply to the proof offered by the defendant, by the witnesses Benson and Brummell, to shew that such notices never were delivered to, or received by said Chafee, is admissible to prove that said Chafee did receive said notices, and that they were notices of protest for non-acceptance, relating to the bill sued on; and that such proof is evidence in connection with the protest for non-acceptance offered in evidence, the proof by the witness Taylor, of the actual delivery of said notices in the first instance to the defendant, as stated by said witness, and the conversations of the defendant with the witness Phenix, as proved by said Phenix, from which the jury may infer, that such notice as is mentioned in the plaintiff's fifth prayer, was given to the defendant; or is at least

evidence from which the jury may infer, that said notices, which according to the proof *of the said Taylor, the witness, was originally taken by him to the defendant, and afterwards by **139** the defendant's directions, were taken by said witness, and left at the residence of said Chafee, were notices of protest for non-acceptance of the bill sued on in this case, or that it is at least, evidence to confirm the testimony of the witness Taylor.

Whereupon the Court [PURVIANCE, A. J.] granted the first, second, third, fifth and eighth prayers of the defendant, and the sixth with plaintiff's qualification, and also granted the plaintiff's prayer, and refused the other prayers of the defendant. The defendant excepted.

The verdict and judgment being against the defendant, he appealed to this Court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

Walsh and *Richardson*, for the appellant. *McMahon*, for the appellee.

CHAMBERS, J. delivered the opinion of this Court. Of the numerous questions arising on this record for our decision, the first is whether the testimony which the defendant proposed to offer, and to which the plaintiff objected, as stated in the first bill of exceptions, was admissible. It is certainly a sound rule, that before you can discredit a witness by proof of his having made statements at variance with his testimony, you must first afford to the witness whom it is intended to impeach, a full and fair opportunity to recollect, by calling his attention to dates, names or other attendant circumstances connected with the matter about which he is to be charged, to have made different statements. But in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, the party will not be allowed to violate any positive law of evidence. It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest for the purpose of disproving it by another witness; nor is it proper to ask a witness with the same view, of a fact proper in *itself to be proved in the cause, if the only knowledge of such fact has been obtained through **140** a source which the rules of evidence do not recognize as competent.

It is an unbending rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy; and to ask a witness to repeat what a party interrogating him has said, although such interrogatory be accompanied with a declaration of his purpose to contradict the answer, might often lead to the introduction of evidence as effectually destructive of this rule as if no such purpose were avowed as a motive for it. In the testimony proposed to be

given and which the Court below allowed to be asked, were certain declarations of the defendant himself in relation to the fact then in controversy. We think the Court properly refused to permit the defendant to give evidence of his own declarations that he was not liable, and had not received notice of protest, nor do we think, as one of the counsel has suggested, that where a question is proposed to be asked of a witness, which involves several distinct members, the Court is bound to select from the question such members of it as might be admissible if unaccompanied by others with which it is connected, and say that such particular portions of the testimony are proper.

The second exception raises the question whether the plaintiff's letter of 7th October, 1840, was admissible evidence. By an agreement of counsel, it is admitted the letter was written and addressed by the appellees, but there is no proof of the time when it was written; none that it was received by the person to whom it was addressed, or that it did in fact enclose the bill of exchange. Waiving however these objections we cannot distinguish between the statements reduced to writing in this letter, and the same statements by the same persons at the same time and under similar circumstances, made verbally. If the person to whom the letter was addressed had been called to prove that the appellees, plaintiffs below, had made to

him the same declarations verbally, it would have * been in
141 direct violation of that admitted rule of evidence which prohibits a party from testifying in his own case; and in this case the facts shew that it was made evidence in despite of another principle, which requires the best evidence the nature of the fact affords. T. Phenix, the person to whom the letter was addressed, by whom the note was received if sent with the letter, was a witness in the cause, and was competent to prove all that the letter itself is said to have been designed to prove. We think the letter was not therefore admissible.

The third exception has been abandoned, and we therefore have only to affirm the opinion expressed to it.

We differ with the Court below in the opinion expressed in the fourth bill of exceptions. Chafee was a competent witness in the cause, and his testimony upon oath was better evidence for any purpose, or in any view, than the testimony of his declarations derived through a third person. The appellees' counsel endeavored to evade the force of this objection, by insisting that Chafee must be regarded as the agent of the appellant, the defendant below, who for that reason could be charged upon his agent's admissions. If an agency be established, it is generally true that an admission of the agent while in the execution of his agency, is admissible to charge his principal. But the only authority which by possibility can be claimed for the witness Chafee, was an authority to receive the notice of protest sent to appellee.

Admitting for the argument, that there was such an authority, his declarations made at the bank at a subsequent time, and in reference, not to the notice to appellant, but to himself, could not be regarded as being in the execution of such authority.

In the fifth exception, the Court below was called upon by the appellant, the defendant below, to instruct the jury on fourteen different points. The Court gave instructions on five of these points as asked for. To one of them the appellee, plaintiff below, proposed a modification, and it was given with the modification annexed. One instruction was asked for by the appellee, which was given.

* The appellant's counsel has rightly abandoned the two points raised on the question of usury, and the remaining 142 questions present themselves for decision.

The first in order contains two distinct propositions of law, one that Taylor's testimony was not sufficient to prove notice of protest; the other that proof of waiver of notice would not support the action if the appellant received no consideration.

To entitle an appellant to a reversal for error in instructions, he must make good all the propositions contained in his motion, however numerous they may be. Hence the prudence of presenting a single and explicit point to the consideration of the Court.

If the first of the two propositions before us had been presented singly, we should say it was sustained. The amount and importance to the community of negotiable paper, has occasioned a system of law as applicable to it, peculiar in many respects. Its apparent strictness has been found by long experience a necessary preventive to serious mischief. The necessity which introduced it, continues to demand an exact conformity to its terms. In no department of this system is there required more unyielding compliance with its rigorous demands, than in regard to notice of protest. Certain technical rules as to the time and manner of serving it have been adopted, and no question about consequent loss or otherwise, or about abstract notions of justice or equity, can be started with the view to exempt a party from their observance. It is admitted that it was necessary in the present case, that notice of protest should have been served on the appellant not later than on Monday, the 13th January, 1840, on the hypothesis most favorable in this respect to the appellees; that is, assuming that notice of protest was addressed under cover to T. Phenix. The necessity for plain and satisfactory proof as to the time of service has always been insisted on. Certainly it may be proved by circumstantial testimony, but the circumstances must point not to notice at some time, but to notice on the day when the party had a right to expect and receive it. In 1 *Stark. Rep.* 314, the proof was on one of two days, but the Court held it * not sufficiently certain. Here Taylor says it was "some time in January." 143

It has been urged that the testimony of one witness cannot be selected from a mass of testimony with which it is connected, and

be made the subject of such an instruction. It well may, and doubtless often does happen, that a fact is satisfactorily proved to the jury by the testimony of several different witnesses, each testifying to distinct parts of a transaction, when the evidence given by either one, would not prove the fact. Still we do not perceive the propriety, or principle or authority, of restraining a party from attacking the evidence of either of the several witnesses as to its sufficiency. He may be able to impeach, contradict or explain the testimony of the others, and thus make it quite important to have the legal effect of the one witness declared by the Court. If he fails to contradict it in any part, or if the opposite party apprehends misconception on the part of the jury from such an instruction, the effectual remedy is at hand by asking an instruction on the whole testimony taken together.

But although this first proposition is tenable, the Court correctly refused to give the fourth instruction asked for, because the second proposition involved in it could not be sustained. We hold it clear, as well upon principle, as from adjudged cases, that a party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him. The authorities cited in the argument shew that this is regarded as settled law elsewhere, and in the late case of the *Farmers Bank vs. Duvall*, 9 G. & J. 31, this Court assumed such to be the law in Maryland, although the objection was urged then, as it is now, that the declaration expressly alleged notice.

The next question we are to consider in this exception is, whether there be any thing of which the appellant can complain in reference to the giving of the sixth of the instructions asked for by him. We hold it to be the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the Court distinctly upon * it. If the opposite party believes **144** that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist. To allow this, would often defeat a most important right. The illustration may be found in the case before us. Assuming, as the appellant's sixth instruction does, that the appellee would rely on proof of presentment and notice of non-acceptance, and not on a waiver of notice, it is not denied that it contained the law of the case, correctly asserting that notice must be proved as therein stated, and that the burthen of proof was upon the plaintiff in the cause. The assertion of this proposition was of no sort of importance to the appellant, unless he could satisfy the jury, that the plaintiff below had failed to exhibit the proof which the Court declared it to be necessary for him to produce. He thereby virtually denied the existence of such proof. It would

therefore be manifestly suicidal for him to subjoin to the instruction asked for, the further opinion of the Court that the jury might, in the facts enumerated in the modification, find the proof required. In effect it makes the appellant to ask the Court to say to the jury, "the plaintiff cannot recover without a certain description of proof, but the facts in evidence may be regarded as such proof." No party can be coerced into such an attitude. If the proposition asked for is not justified by the evidence, or is not in accordance with the Court's opinion of the law, they may refuse it altogether, or they may state in what respects they dissent from it, but the opposite party has not the right to annex modifications to it against the consent of the party moving it. Although the exception does not explicitly state this as one of the grounds on which it was taken, yet the generality of its terms will include this as well as every other ground of complaint. We think the Court was wrong therefore in declining to give the sixth instruction without the modification. We think too, that the language in which that modification was expressed, was calculated to lead the jury to a conclusion which *the Court certainly 145 could not have designed to influence. "The proof by the witness Taylor of the actual delivery of certain notices of protest to the defendant," these expressions might readily be regarded by the jury as evincive of a decided opinion that Taylor had proved an actual delivery of notice to defendant, and yet it is very manifest that this was one of the contested facts in the cause, upon which of course the jury should act without the slightest bias from the Court.

In the seventh instruction, the Court informed the jury that if the suit was brought in the name of the plaintiffs below by order of the Western Bank, it was not sufficient to defeat the action to shew that the bank was the owner and holder of the note at the time the suit was instituted.

Assuming the language used to import the entire and exclusive interest in the bill and its possession, we do not concur in that opinion. The authorities produced by the appellee's counsel, and the principles deduced from them are not denied. Possession of a note endorsed in blank, will enable the party having it to maintain suit, except *mala fides* be proved. Courts will never enquire whether a plaintiff sues for himself or as trustee for another; nor into the right of possession, unless on an allegation of *mala fides*; and blank endorsements may be filled up at the moment of the trial. None of these propositions can govern this case. It is a principle of universal application, that actions at law are to redress wrongs or enforce rights. The *quantum* of the injury or the value of the rights may not be weighed, but to complain of an injury inflicted, or a right violated, when that injury was exclusively inflicted on another, or the right exclusively the property of another, without any interest in the plaintiff, would certainly be an anomaly in the law. None such is found in the particular department we are considering. If a bill

has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee. *Story on Bills*, 230, 231, *sec.* 207, 208. Why is it so? Certainly for the reason that as no interest in such a bill can pass by delivery alone, the entire interest in legal contemplation remains in the last endorsee, and all others are strangers in interest.

146 * A bill payable to bearer, or a bill payable to order and endorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill will entitle the holder to sue. The law is not changed by any consideration of the character of parties as principal or agent. If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name; or if the endorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger. Some interest must appear. It may be said that where all the endorsements are in full, the last endorsee may sue for the use of the actual holder. True he may, and this confirms the principle we assert, the endorsee being the legal plaintiff.

In the case before us the appellant, the defendant below, claimed that by the evidence, it appeared that the plaintiffs in the action had received the bill merely as agents for the Western Bank, to whom they had returned the bill prior to the suit, and that the bank continued to be the owners and holders of the bill. The case of *Clark vs. Pigot*, 1 Salk. 126, has much analogy to the present in principle. There Clark having a bill payable to himself or order, put his name upon it, leaving a vacant space above, and sent it to his friend J. S., who got it accepted. Upon suit brought by Clark against the acceptor, it was objected that J. S. should have brought suit and not Clark. It was held that J. S. might have made himself endorsee by filling up the blank to himself, and then the property in the bill would have passed to him, and he alone could have maintained the action; or he might act as servant to Clark, (of which his failure to fill the blank was regarded as proof,) and thus leave the property of the note and the right of action in Clark. It would seem that striking out the name of T. Phenix, and returning the bill by the appellees to the Western Bank, would be at least as strong evidence of their acting as agents for the bank in the present case. The legal interest in such a bill, payable to order with full endorsements, can pass only by endorsement, and the person holding it, though for full value, has * but an equitable interest, which the Court will **147** protect to the same extent as it does the equitable interests of those for whose use actions are instituted upon *choses in action* not negotiable.

The decisions in this Court have been in perfect consistency with these views.

In *Hudson vs. Goodwin*, 5 H. & J. 115, it was held that a plaintiff was not entitled to recover on a promissory note payable to order, because the endorsement was in blank, although he might have filled it up at any time before verdict. The same point was ruled in *Day vs. Lyon*, 6 H. & J. 140.

In *Kiersted vs. Rogers*, 6 H. & J. 282, it was held that a blank endorsement might be filled up by the holder at the time of the trial; that if filled up and made payable to himself, the holder must sue as endorsee, but if not filled up he may sue in the "name of the endorsee," meaning of course, for the use of the holder. In that case the endorsements were in full, and the last of them to the plaintiff, who had endorsed their names in blank, but had retained the bill, or at all events held it at the institution of the suit; and the Court say the plaintiff had not parted with any interest in the bill by the act of endorsing it in blank.

The Act of 1825, ch. 35, passed since these cases were decided, provides that no judgment shall be set aside because of the endorsement being in blank, and in effect gives to a plaintiff all the advantage from a blank endorsement which he could derive from an endorsement in full, so far as his right of action is affected. Any holder therefore with a blank endorsement, may now sue in his own name, but the Act of 1825 cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner.

In *Bowie, use of Ladd vs. Duvall*, 1 G. & J. 175, the note was given by Duvall to Bowie, and by him endorsed in full to Ladd. The suit was in the name of Bowie for the use of Ladd. The Court after referring to the Statute of 3 & 4 Anne, ch. 9, which put promissory notes and bills of exchange on the same footing, say, "when a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and he alone * is qualified to maintain a suit." And it was held accordingly, that Ladd should have **148** been the legal plaintiff, and could not support the suit in the name of Bowie for his use. Yet if Ladd had endorsed his name in blank and transferred the note to a third person, there can be no doubt, without reference to our Act of 1825, that such third person, being the holder of the note, might have sued in his own name and have filled up the blank endorsement at the trial, making it payable to himself, or without filling the endorsement might have sued in the name of Ladd for his use. But that in such a case as the one last mentioned, to wit, a blank endorsement and delivery of the note by Ladd to a third person, a stranger not having any legal interest in the note, either by the terms of the endorsement or by the possession of the note, could have maintained the suit in the name of such stranger, we cannot agree. And such is the hypothesis of the instruction asked for in the case at bar, and which for the reasons assigned, we are of opinion the Court should have granted.

The tenth instruction was upon the admissibility of the Acts and declarations of Chafee, in regard to which we have given our views in discussing the fourth exception. We will only add, that there appears to be no act of Chafee, in evidence, except his going to the bank, and we have treated the exception therefore as if it were an objection to his declarations. If any act of his affecting in any manner the issue in the cause had been the subject of the exception we should consider it as properly admissible by any competent witness, as any other fact.

The Court properly refused the eleventh instruction asked for. It is a settled principle that the Court will not instruct the jury in such unequivocal terms, if there be any evidence whatever tending to prove the issue.

The declarations of the appellant to T. Phenix had been given in evidence; they were to be weighed by the jury. The counsel seemed to admit, and the authorities certainly shew, that admission of notice is evidence on which the jury may find notice in due time and in due form. *Vide 7 East*, 237; 28 * *Eng. Com. Law*, 401; 33 *ditto*. **149** 337; 41 *ditto*, 427 and 790; 1 *Leigh*, 448. And 23 *Wendel Rep.* 379, *Tebbets and Pearce vs. Dowd*.

We think the Court below properly refused the twelfth instruction. It can no longer be considered an open question, whether an action will lie upon notice of presentment and non-acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill. The holder is not bound to present a bill, payable on a certain day after date, for acceptance; unless indeed he be an agent to get it accepted or to collect it. 5 *Dow. & Ryl.* 374, *Van Wait & Woolley*; 3 *Barn. & Cres.* 439; *Chit. on Bills*, 300. If it be presented and acceptance is refused, it is dishonored and immediate notice must be given to the parties who are to be charged. 1 *Peters S. C. Rep.* 25, *Bank of Washington vs. Triplet & Neale*; 2 *Ib.* 170, *Townley vs. Sumrall*. That the drawer or endorser may forthwith be sued upon the protest without waiting for demand of payment, is abundantly settled by the long list of authorities cited in argument, to which others might be added if there were any conflicting decisions, which we do not find to be the case. *Vide Story on Bills*, 367, *sec.* 21, and the authorities there cited.

In the case in the late General Court, reported in 1 *H. & J.* 187, *Phillips vs. McCurdy*, the neglect to give notice of the non-acceptance was a sufficient ground on which to sustain the opinion of the Court.

The fourteenth instruction presents the question whether the protest is of itself any proof that notice had been "duly and legally sent from Charleston to Baltimore."

The Act of 1837, ch. 253, was obviously designed to extend the credit, which by the courtesy of commercial relations had previously been given to the certificate of a notary public. That certificate had

been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment. This was of course on the ground, that in every commercial community this officer would be worthy of faith and credit, or at least would be so considered until the contrary was made appear by disproving his assertion. The Act of Assembly has wisely *carried out the same presumption by saying first, that this doctrine should so applied thereafter as well to inland as 150 to foreign bills or notes, and secondly, that such protest should be *prima facie* evidence that notice has been sent or delivered in the manner therein stated. This Act of Assembly is to be so construed, as to effect the obvious purpose of its enactment. It is not necessary that notice be sent by mail. The legal presumption is, that where there is a regular daily mail, it affords an early conveyance and a safe one, and a party is not bound to use one more expeditious or certain, but he may do so, and surely it would be no cause of exception to the regularity of the notice, that it was received in advance of the mail. Neither is it necessary, however it may be prudent, that the notice if sent by the mail be enclosed to the address of the person to be charged. If a party be willing to hazard the receipt of notice by his correspondent, and the due attention of the correspondent to the service of the notice, he must abide the result. But if the party to be charged receive the notice in due time, he cannot object to the means which the owner or holder of the bill has employed. The Act of Assembly seems so to regard the matter, where it puts the case of a protest which "shall state that notice has been sent or delivered to the party or parties to such note or bill, and the manner of such notice." This protest states the "notices were forwarded to the drawer and endorsers under cover to T. Phenix, &c." The notices were sent to the drawer and endorsers; the manner of sending them was by enclosing them under cover to T. Phenix, Baltimore. If therefore the name of Phenix had never been upon the note, as by the admission now put on the record is found to have been the fact, we should hold there was no force in the objection, that the notice was not sent to the parties, considering the Act of 1837 to apply to a case in which a notary shall certify that he has sent notice to a party under cover, addressed to a third person. In this case there was evidence before the jury tending to shew that the appellees were acting as agents for the bank without any actual interest in the bill, and the appellant has based some of his motions for instruction on this theory. *Consistently with this as- 151 sumption, it was quite in conformity with their duty as agents, to send, or cause the notary to send, the notices to the principal. *Vide 3 Bos. & Pul. 599, Haynes vs. Birks, and 8 Barn. & Cres. 387, Firth & Thrush.* This would make a clear case within the Act.

It is true that in these cases, the entire object designed by the Act is not affected, to wit, the service of the notice on the parties to be charged, or the equivalent fact of putting a notice separately addressed to each into the post-office, but that result ensues, because the parties have not availed themselves of the advantage the Act gave them. Their neglect to do so, will require the further proof to the jury, that the person to whom the notary enclosed the notices, had served them in due time. This instruction does not meddle with that link in the chain of testimony; it is not made a question whether notice was duly sent to the party to be charged, but to Baltimore, and that question was in our opinion properly decided by the Court.

The only remaining matter for consideration, is that involved in the instruction given at the instance of the appellees, and in regard to most of which, our views have been already expressed.

In this bill of exception, it is carefully stated that Chafee's declarations were offered in reply to the testimony of other witnesses, but we cannot agree that this obviates the difficulty which is fatal to their admissibility. If the facts were as Chafee's declarations stated them to be, it was competent and necessary to call him to prove them, and the rule which excludes hearsay testimony, is as obligatory in repelling and discrediting testimony, as in confirmatory. The Court therefore erred in presenting such testimony to the jury as the foundation, in any degree, upon which to find a verdict. A party may group into one instruction as many and as complicated facts as he pleases to assume his testimony will prove, and ask the Court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such, as whether from a total failure of evidence tending to prove them, or from having
152 been ruled out of the cause, or for other * reason, it is not competent for the jury to act upon, he must fail in his application. And if on appeal, this Court shall determine any fact in such hypothesis to have been improperly allowed to go to the jury, the decision of the Court below granting such prayer must be dissented from. We find in this instruction also, the objectionable manner of putting the testimony of Taylor before the jury, which has been alluded to when speaking of the "modification" to the sixth instruction. We should feel ourselves compelled to dissent from the opinion of the Court below as expressed in this instruction, for the reason that they were authorized to find one of three alternate and distinct propositions of fact, without saying which. The instruction is, that the jury may infer that "notice was given to the defendant, or at least that the notices taken by Taylor, by direction of defendant to Chafee's residence, were notices of protest for non-acceptance of the bill sued on," or at least might regard it as "evidence to confirm Taylor." The great point in contest, was due notice, *rel non*. If the evidence was legally sufficient to find for the plaintiff on that

point, and the jury believed it, they might find accordingly, and the instruction thus covered the whole case.

The second assumes that the testimony might not be legally sufficient to authorize a verdict on the point of notice to defendant, but it would authorize the jury to identify the paper spoken of by Taylor, and which being identified, formed one item in the proof of notice, but still left open the important question of when that notice was served. The third proposition is, that the evidence may be regarded to confirm the testimony of Taylor. But assuming Taylor to be sustained, and the jury satisfied that Taylor was perfectly accurate in what he had said, yet he had not said that he gave due notice to the defendant, and the jury might believe he had served a notice, and that it was of the dishonor of the bill sued on, and yet consistently with this, they might think it was not proved to be on the 11th January. We do not think that such an alternate series of propositions should have been presented to the jury with an opinion that they might find some one of them. It * would be impossible for them to ascertain whether they were thereby authorized **153** to find the first or the second. The sole purpose of instructing the jury, is to aid and enlighten them in their duty, so far as it is competent for the Court to assist them. If counsel present to the Court a complicated and involved statement which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the Court should refuse to give a direction in the terms asked for. It is much to be desired, that propositions for the Court, or for the jury, should be as precise and distinct as possible. Few instances will be found in which a transaction however ramified in its details, may not be reduced into something like elementary and distinct parts or points, each readily to be comprehended by minds of ordinary intelligence.

It may be proper to remark, that amongst the errors we have noticed, there are some, which of themselves would not have been deemed of sufficient influence in the decision of the cause below, to require this Court to reverse the judgment and send the case back; but there are others of such substantial importance as to induce us to reverse the judgment and award a *procedendo*.

Judgment reversed, and procedendo awarded.

ROBERT W. BROOKE vs. WILLIAM F. BERRY.—December, 1843.

In an action of replevin brought for certain slaves by W. against R. and E. it was proved, that for several years before the 1st January, 1837, the defendant E. was in possession of the slaves taken under the writ. The plaintiff for the purpose of showing title in himself, proposed to read to the jury articles of agreement dated on that day, between himself and E. by which the latter agreed to furnish him with certain negroes,

bearing the same names with those replevied,) for the period of ten years. The defendant objected to the admissibility of the articles of agreement, upon the ground that there was no evidence that he claimed title under E. or any connexion between them. *Held*:

- 154** * 1. That if the articles of agreement furnished evidence that E's title had passed to W. (the plaintiff having first showed that E. had title,) they established his title against the defendant, whether the defendant claimed under E. or not, or whether E. had any connexion with R. or not.
2. That the question to be decided was the admissibility of the evidence offered, and not the correctness or incorrectness of the particular ground on which the Court below decided.
 3. That there must be some evidence to show the identity of the negroes assigned, with those replevied.
 4. That having shown title in E, the articles constituted a link of the plaintiff's title, and would or would not be evidence in the cause, upon the establishment or failure to establish the identity of the negroes.
 5. That the defendant having objected to the evidence on a ground that assumed the identity of the negroes, and before the plaintiff had an opportunity of disclosing his whole proof, the Court below were justified in assuming, what he, in such a state of the case, conceded.
 6. The original possession of E. the negroes being replevied from him, and bearing the same names in the articles and writ, and nothing to show that E. had other negroes of same name, is evidence of identity.

The action of replevin is appropriately applied to all cases in which the plaintiff seeks to try the title of personal property and recover its possession. (a)

E. by articles under seal agreed with W. that for the consideration therein-after mentioned, he would furnish him with negroes, &c. "all which property is to remain with the said W. on the land where he now resides, for and during the term of ten years, and to pay him annually the sum of, &c. W. agreed that he would pay E. one-half of the crops made during the above time, and would superintend and look after all E's business." On the execution of the agreement, the negroes were delivered to W. and remained with him several years, when they ran away and came to the possession of E. and R. the other defendant in the writ. *Held*, that replevin was an appropriate remedy for W.; and he was not bound in order to maintain it, either to show a performance, or a readiness to perform the agreement on his part, and that the contract gave him a present and immediate right to the negroes, and to possession for ten years from its execution.

E. in 1837, conveyed certain negroes to W. to be retained by him for ten years; some time after the negroes ran away, and came again to the possession of E. who in February, 1840, executed a deed of trust of all his estate to R. In an action of replevin brought in May, 1840, by W. against E. and R. for the negroes, the defendants proved that in March, 1840, R. called on W. and informed him of his deed, and that he came to demand the land, negroes, &c. of E. then in W's possession, who said, there are the negroes, go and take them, I have no title to them, but I will not give up the land; that two of the negroes in controversy

(a) Approved in *McKinzie vs. R. R. Co.* 28 Md. 174. See *Cullum vs. Bevans*, 6 H. & J. 385.

were then in view of the parties at work with other negroes, proved to have been the property of E. Under such a state of facts, the plaintiff, for the purpose of rebutting the inference that he surrendered and abandoned all right to the negroes, * may show that immediately after the demand made upon him by R. that he, R. and the witness who proved it, went to the residence of E. where W. asked him in the presence of all the parties, whether he had authorized R. to interfere with the property mentioned in the agreement of 1837, and that E. replied he had not, that his intention was to convey his residuary interest in the property in W's possession. **155**

APPEAL from Prince George's County Court. This was an action of replevin, brought on the 15th May, 1840, by William F. Berry against Elisha Berry (who died before the trial,) and Robert W. Brooke, for the negro slaves mentioned in the proof. The slaves were replevied and delivered to the plaintiff.

The defendant pleaded—

1. Property in the defendant.
2. Property in a stranger.
3. *Non cepit*.
4. *Actio non accrevit infra tres annos*.

On these pleas issues were joined, and the jury found the following verdict, viz: that the plaintiff is entitled to the possession of the negroes replevied in this case, to wit, John, Bill and Hanson, for the unexpired term of ten years, which commenced on the 1st January, 1837, and one cent damages.

1st Exception. At the trial of this cause, the plaintiff to maintain the issues joined on his part, proved to the jury that for eight or ten years prior to the 1st January, 1837, Elisha Berry, one of the defendants, against whom the writ in this cause issued, was in the possession of the negroes taken under the writ; that he the said Elisha Berry, died in the month of April, 1841, and was alive and in being at the period of the execution of the writ. The plaintiff then, for the purpose of showing title in himself, proposed to read to the jury the following articles of agreement, between the said Elisha Berry and the plaintiff, dated the 1st January, 1837, which are as follows:

"Articles of agreement made, concluded and agreed upon, this 1st day of January, 1837, between Elisha Berry, of Prince George's County, of the one part, and William F. Berry, of * the same place, of the other part, as follows, to wit: The said Elisha Berry, for the consideration hereinafter mentioned, doth for himself, his executors and administrators, covenant, promise and agree, to and with the said William F. Berry, his executors, administrators and assigns, that he the said Elisha Berry, shall and will furnish him the said William F. Berry, with the following property, to wit, one negro man named John, one negro man named Andrew, one negro man named Robert, one boy named John, one boy named Hanson, one boy named Robert, one woman named Beck, and one boy **156**

named Bill; two plough horses, two oxen, ploughs, cart, and other plantation utensils; all which property is to remain with the said William F. Berry, on the land where he now resides, for and during the term of ten years from the date hereof. And he the said Elisha Berry, doth further covenant and agree to pay to the said William F. Berry, one hundred and fifty dollars, annually; and the said William F. Berry, on his part, doth hereby covenant and agree, that he will pay to the said Elisha Berry, the one-half of the crops made by him the said William F. Berry, for and during the term above named, after deducting the expenses for making the said crops. And he the said William F. Berry, doth covenant and agree to superintend and look after all the said Elisha Berry's business. For the true and faithful performance of the foregoing covenants and agreements, the said parties do hereby respectively bind themselves and their respective heirs, executors and administrators, each to the other, his executors and administrators, in the sum of one thousand dollars. In witness whereof, they have hereunto set their hands and affixed their seals, the day and year above written.

ELISHA BERRY, [Seal.]

W. F. BERRY, [Seal.]

Signed, sealed and delivered in the presence of *Enos D. Ferguson*.

But the defendant objected to the admissibility of said articles of agreement, upon the ground that there was no evidence to shew that he claimed title under the said Elisha Berry, or that there was any connection between them. The Court, * [STEPHEN, C. J. and
157 KEY, A. J.,] however, overruled the objection, and suffered the said paper to be read to the jury. To which opinion of the Court, permitting the said paper to be read to the jury, the defendant excepted.

2nd Exception. After the evidence mentioned in the preceding bill of exceptions, (and which is to be considered part of this exception,) had been offered by the plaintiff, the plaintiff further proved, that the negroes replevied in this cause, are part of those mentioned in the said agreement, and that immediately on the execution of the said agreement, the said negroes so replevied, were delivered into the possession of the said plaintiff, and remained with him until the spring of the year 1840, when they ran away, and came to the possession of Elisha Berry and the defendant. The defendant thereupon insisted, that upon all the preceding evidence, the plaintiff had not shewn himself entitled to recover in the present action.

1. Because he had not shewn that he had performed or offered to perform the covenants to be performed on his part, and

2. Because his remedy, if he has any, is by an action of debt or covenant on the said agreement, and prayed the Court to instruct the jury accordingly. But the Court [STEPHEN, C. J., and KEY, A. J.,] overruled the objection and refused the instruction. The defendant excepted.

3rd Exception. This being an exception by the plaintiff below, who did not appeal, is not decided by this Court, but inserted as containing a part of the evidence.

At the trial of this cause, after the evidence in the preceding exceptions, which by agreement is to be taken as part of this exception, the plaintiff to maintain the issues on his part joined, offered in evidence to the jury, the articles of agreement bearing date the 1st day of January, 1837, having first proved their due execution by the plaintiff and the defendant Elisha Berry.

The plaintiff also proved, that on the day of the execution of the said paper, the negroes in controversy in this cause, were in virtue of said agreement, put into the possession of the plaintiff, and that they remained in his possession until the * spring of 1840, when they ran away, and were in the possession of the said defend- 158 ants Elisha Berry and R. W. Brooke, when the writ of replevin issued in this cause. The plaintiff also proved, that for some eight or ten years prior to the execution of said paper, the negroes replevied in this cause, were in the possession of Elisha Berry.

The defendant then, in support of the issues on his part joined, offered to read in evidence to the jury, a deed of trust from Elisha Berry to the defendant R. W. Brooke, dated 24th February, 1840, which is as follows :

This indenture made this 24th day of February, in the year of our Lord, one thousand eight hundred and forty, between Elisha Berry, of, &c., and Robert W. Brooke, of, &c., witnesseth, that for and in consideration of the sum of, &c., to him in hand paid by the said Robert W. Brooke, the receipt, &c., he the aforesaid Elisha Berry, hath given, granted, &c., and by these presents doth give, &c., unto the said Robert W. Brooke, his heirs and assigns, all that tract or parcel of land called and known by the name of Good Luck or Springfield, upon which the said Elisha Berry now resides, lying and being in the county, together with all and singular the buildings, &c., and all the estate, right, title and interest whatsoever of him the said Elisha Berry, which he hath, either in law or equity, of, in and to, &c., &c.; together with all my slaves, that I have now in my possession, to wit, &c.; together with all my household and kitchen furniture, and all the farming utensils, and all the plantation stock; as also the whole or whatsoever portion or portions of the estate of the late Nancy Berry, deceased, which is devised to me in her will and to which I may be entitled to in the distribution of her estate, whether real or personal, now or at any time hereafter, whatsoever consisting. To have and to hold all the aforesaid tracts, parts or parcel of land, and all the said negroes and slaves, household, and kitchen furniture, plantation stock, goods and chattels, whether in possession, remainder or reversion, unto him the said Robert W. Brooke, his heirs and assigns forever. In trust, nevertheless, to have

159 and to hold the above described * real and personal property forever, in trust, to and for the use, intent and purpose, that is to say, for the use of my five children, Mary Ann Brooke, &c.; nevertheless, to have and to hold unto him the said Robert W. Brooke, his heirs and assigns, the rents, issues and profits of the aforesaid parts or parcels of land, together with all the profits which may in any manner issue out of, or appertain to all or any part of the above described land, goods and chattels, to and for the use of the said Mary Ann Brooke, Louisa Berry, William Berry, Nancy Berry and Eliza Berry. And the within Elisha Berry himself, be well supported as long as he may live, out of the within named real and personal estate heretofore named in said deed, and for no other use or behoof whatsoever; and the aforesaid Elisha Berry, for himself and his heirs, executors and administrators, doth covenant and agree with the said Robert W. Brooke, his heirs and assigns, that he the said Elisha Berry, and his heirs, the aforesaid tracts, parts or parcels of land, hereby granted, bargained and sold, with the appurtenances hereunto belonging, to him the said Robert W. Brooke, his heirs and assigns, against the said Elisha Berry, and his heirs, and all claiming under him or them any right, title or interest in and to the same, or any part thereof, shall and will, and by these presents forever warrant and defend. In testimony whereof, I have hereunto set my hand and seal, the day and year above written.

ELISHA BERRY, [Seal.]

Signed, sealed and delivered in the presence of us, *John Anderson, Thomas Clements.*

The said deed embracing the negroes in controversy. And further offered to prove by credible witnesses, that sometime in March, 1840, the defendant R. W. Brooke, called on the plaintiff, and stated to him, that he had obtained a deed of trust from Elisha Berry to him, of all the property of Elisha Berry, in the possession of the plaintiff, and that he came to demand the land, negroes, farming utensils, and all other property of Elisha Berry, then in the plaintiff's possession, and that the plaintiff said, there are the negroes, go and take them, I have no title to them, but I will not give up the land;

160 and also * proved, that two of the negroes in controversy, were then in view of the parties at work with other negroes, proved to have been the property of Elisha Berry.

The plaintiff then to rebut the evidence so offered by the defendant, offered to prove by a competent witness, that after the execution of the said deed of trust, and after the said negroes were replevied in this suit, he the witness, was in company with Elisha Berry at his house together with the plaintiff, when Elisha Berry told plaintiff in the presence of witness, that he had never authorized the defendant Brooke, to interfere with the plaintiff's possession of said negroes, and that he did not design by the deed of trust aforesaid, to authorize said Brooke to interfere with the possession

of any property embraced in the articles of agreement of January, 1837.

The defendant, by his counsel, objected to the admissibility of said testimony, so proposed to be offered by the plaintiffs, upon the ground that said evidence would conflict with his said deed of February, 1840, and that the grantor in said deed, after its execution, could not by any act or declaration of his, impair the rights of the grantee, or of the parties beneficially interested therein, and the Court being of that opinion, excluded said proof from the consideration of the jury; from which opinion of the Court, and their refusal to permit said proof to go to the jury, the plaintiff, by his counsel, prayed leave to except.

4th Exception. After the evidence contained in the preceding exceptions, and which are made part of this exception, had been offered to the jury, the plaintiff offered to prove by Elisha Perry, a competent witness, that immediately after Robert W. Brooke had demanded the property in question from the plaintiff, as proved in the preceding exceptions, and on the same day, the said Robert W. Brooke, William F. Berry, the witnesses by whom the demand was proved, and the said Elisha Perry, went together to the residence of Elisha Berry, distant about four miles from the place where the demand was made; that R. W. Brooke went after Elisha Berry, and when they were all together, a conversation ensued, in which William F. • Berry asked Elisha Berry, in the presence of Robert W. Brooke, whether he had authorized Robert W. Brooke, to **161** demand or interfere with the property mentioned in the said agreement of January, 1837, and Elisha Berry replied, that he had not authorized him to take possession of, or interfere with that property, and that he only designed by the deed of February, 1840, to give him present control over the property at Springfield, and to convey his residuary interest in the property in William F. Berry's possession.

The defendant objected to the admissibility of this evidence, on the ground that it would conflict with the said deed of February, 1840, and because the grantor in that deed, could not after its execution, by any act or declaration of his, impair or affect the rights of the grantee, or of the parties beneficially interested therein; but the Court overruled the objection, and permitted the said evidence to go to the jury. The defendant excepted.

The verdict being for the plaintiff, the defendant took this appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

J. Johnson and T. F. Bowie, for the appellants.

T. G. Pratt and C. C. Magruder, for the appellee.

ARCHER, J. delivered the opinion of this Court. The inadmissibility of the evidence of the articles of agreement set out in the first

bill of exceptions, was put in the Court below, upon that ground that there existed no privity between Brooke and Elisha Berry, or that he claimed title under Elisha Berry; this could certainly furnish no justifiable ground for the rejection of the evidence. If the articles of agreement furnished evidence that Elisha Berry's title had passed to the plaintiff, (the plaintiff having first shown that Elisha Berry had title, they established his right to recover against the defendant, whether the defendant claimed title under Elisha Berry or not,

162 and whether he had any connexion with Berry or not. * If a contrary doctrine prevailed, every wrong-doer would defend himself against a plaintiff's title, however clearly made out, if he could establish the fact that he were not in privity with the party from whom the plaintiff deduced his title. Such a doctrine would be subversive of all the principles upon which the action is founded. This ground is, however, not insisted upon in this Court, but it is said, the articles of agreement should be rejected as evidence, because they are not accompanied with any proof, or offer to prove, or statement of counsel, that they have proof of the identity of the negroes replevied, and the negroes named in the agreement. It is admitted that the question before us is, the admissibility of the evidence, and not the correctness or incorrectness of the particular ground upon which the Court below may have decided the question; and it must be admitted, that without some evidence showing the identity of the negroes, the articles of agreement would not establish the plaintiff's title. But having shown title in Elisha Berry, these articles of agreement constituted a link in the plaintiff's title, and would or would not be evidence in the cause upon the establishment or failure to establish the identity of the negroes. Before, however, the plaintiff has an opportunity of disclosing his whole case, the evidence is objected to upon a ground which assumes the identity of the negroes, placing the inadmissibility of the evidence upon the want of privity between Elisha Berry and the defendant. In such a state of the case, we apprehend the Court below were fully justified in acting upon such assumption in forming their judgment on the admissibility of the evidence. But independent of this ground, we think the Court were right, because the bill of exceptions contains evidence proper for the consideration of the jury, as to the identity of the negroes. It is proved, that for ten years anterior to the 1st of January, 1837, Elisha Berry, was in possession of the negroes replevied in this suit, to wit, Bill, John and Hanson, and the articles of agreement stipulate that Bill, John and Hanson, among others, shall be furnished to Berry, the plaintiff, and shall remain with him for ten years from the date thereof. Now this was certainly evidence from * which it

163 could be inferred that the negroes replevied and the negroes in the agreement were the same, unless it were shown on the part of the defendant, that Elisha Berry had other negroes of the same

name. We therefore think the Court were right in their opinion in the first bill of exceptions.

That an action of replevin is an appropriate remedy in this case, we cannot doubt. By the law of Maryland it is appropriately applied to all cases in which the plaintiff seeks to try the title to personal property, and recover its possession, and we are clearly of opinion, that the plaintiff was entitled to the possession of these negroes, which had been delivered to him under the agreement, and that his right of possession was not divested by their running away and getting into the possession of the defendants, and that as preliminary to the establishment of such right of possession, no evidence whatever was necessary to be furnished of a performance, or a readiness to perform the agreement on the part of the plaintiff.

The covenants in this deed are independent. The covenant to deliver the negroes to the plaintiff, is first in order of time, for without the negroes the plaintiff could not make a crop to divide according to the agreement, with the defendant Berry, and if there had been a failure to deliver the negroes, an action could have been immediately sustained on the covenant. There existed a present and immediate right in virtue of the contract to the possession of the negroes, and the contract was executed by the parties in conformity with this construction, and the plaintiff was entitled to the possession for the whole term of ten years by the express stipulations of the contract. Neither party possessed any power to rescind the contract against the will of the other, nor did the non-performance by the plaintiff on his part (if such were the fact,) destroy the rights which he had acquired under the contract. The casual possession of the negroes acquired by the defendant Berry, did not enable him to retain the negroes, and to treat the agreement as a nullity. That it was the intention of the parties to the contract, that possession of the negroes should, immediately on the execution of the agreement, pass to William F. Berry, is clear, not *only from the acts of the parties, but from the terms of the agreement. The 164 negroes are proved to have been immediately delivered, and the agreement stipulates that he shall have them for ten years from the execution of the agreement. The case of *Culver vs. Shriner*, reported in 5 H. & J. 219, does not militate against our views in this case. On the contrary, they are strengthened by the opinion expressed by the Court in that case. The Court there say, that "from every part of the articles entered between the parties, it is most evident that each relied upon the instrument of writing to compel a compliance with their respective stipulations." But in this case no such reliance was placed, so far as regards the delivery of the negroes in controversy. They were to pass upon the execution of the agreement; for, by the terms of the agreement, William F. Berry was to be furnished with the property for ten years from the date of the agreement. It is apparent that the action of replevin would have

been sustained in the case of *Oulver vs. Shriner*, if the contract had been executed; for the Court say, "if it had appeared that Shriner had complied with the contract, that the mother of the children in controversy had been kept on the place where the children were born, and that Shriner had got possession which Kemp's executor sought to disturb, then it might be said that the property and every right to the issue passed, for it was both a covenant and a grant." In the case before the Court, the right of possession was intended to pass on the execution of the agreement, and according to the agreement the possession did actually pass, and the rights of W. F. Berry were thus perfected in the property. No act was to be done by W. F. Berry, as preliminary to the accrual of his title. The consideration which he was to give, arose after the crops were made with the hands and implements furnished, and the property thus acquired could not be divested either by a failure to comply with his part of the contract, or by the negroes getting into the possession of Elisha Berry by absconding.

The fourth bill of exception is taken upon the admission by the Court of a certain conversation passing between sundry *witnesses and Elisha Berry, in the presence of the other defendant Brooke, in reference to Elisha Berry's design and intention in executing the deed of 1840, in relation to the negroes in controversy. This evidence is objected to as inadmissible upon the ground that no parol evidence can be received to contradict a deed. Had evidence been offered for such a purpose, it would have been clearly inadmissible. But it appears from the evidence detailed in the third bill of exceptions, which is made a part of the one now under consideration, that evidence had been offered on the part of the defendant to show that after the deed had been executed, upon a demand made upon the plaintiff for the negroes in controversy, he had surrendered and abandoned all right to them. The evidence now offered was admissible for the purpose of rebutting the evidence thus offered on the part of the defendant. That he should have sought out Elisha Berry immediately after the language attributed to him, and should have demanded of him whether he authorized Brooke, the grantee in the deed, to demand or interfere with the property mentioned in the agreement of January, 1837, was calculated to induce the jury to believe that he had not surrendered the property, and was proper evidence to be submitted to them, on the question, whether he had or had not abandoned the property.

Judgment affirmed.

THOMAS M. D. BADEN *et al.* vs. THE STATE, use of WILLIAM CLARKE.—December, 1843.

The single bill of a collector of the county, sealed as collector, promising to pay the equitable plaintiff in the action, a sum of money "for value received, with interest, the same being for county paper due for the year 1836-7." *Held:* to be sufficient evidence in the absence of contradictory proof, to entitle the plaintiff to a verdict upon the bond of the collector, as well against the principal as his securities.

Such a bill, is an implied admission, that the obligor had collected and received the amount therein mentioned; that the same had been levied, and the levies transferred to the obligee.

* After verdict, upon motion in arrest, the Court will presume that sufficient proof was offered to the jury, to enable them to find **166** all the allegations in the pleadings, substantially necessary to support the claim of the plaintiff.

The objection that the breaches assigned upon the record, are not sufficiently specific, in stating the names of parties for whom levies were made, and the amounts levied for each person, cannot avail on a motion in arrest.

A party for whom a sum has been levied in the county levies, may make a valid transfer thereof without writing.

Where the assigned breaches are not sufficiently specific, after issue joined upon them the defendant may claim a bill of particulars, to enable him to prepare his defence.

APPEAL from Prince George's County Court. This was an action of debt, brought by the appellee against the appellants, on the 28th September, 1837.

The plaintiff declared on the bond of T. M. D. Baden and others, dated 18th July, 1836, which contained the following condition, viz: "the condition of the above obligation is such, that if the above bound Thomas M. D. Baden, appointed collector of Prince George's County, shall well and faithfully execute the several duties required of him by law, and shall well and truly account for, and pay to the justices of the Levy Court, or their order, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct, then the above obligation to be void, else to be and remain in full force and virtue in law." The defendants pleaded general performance.

The plaintiffs replied, that at the time of making the writing obligatory aforesaid, and thereafter, the said Thomas M. D. Baden was collector of the county charges and public assessments, imposed by law on the inhabitants of the said county, and that before the making of the said writing obligatory, to wit, on the 14th day of July, 1836, there was allowed by the justices of the Levy Court of said county, unto sundry citizens of said county, or others, divers sums of money, for divers services, and so forth, amounting in the

whole to the sum of eight hundred and five dollars, current money, which said several sums of money, had by the persons thereto entitled as aforesaid, been transferred and assigned to the said William

167 * Clarke in the endorsement of the writ issued in this cause mentioned, and for whose use this suit is instituted, whereof the said Thomas M. D. Baden, collector aforesaid, afterwards, that is to say, on the day and year aforesaid, at the county aforesaid, had notice. And the said State, by its said attorney, further in fact saith, after the said sums of money had been transferred and assigned to the said William Clarke, in manner and form aforesaid, to wit, on the 28th day of July, 1837, the said Thomas M. D. Baden, as collector aforesaid, accounted together with the said William Clarke, of and concerning the said sums of money, and upon that accounting, the said Thomas M. D. Baden, as collector aforesaid, was indebted to the said William Clarke, in the sum of eight hundred and five dollars, current money aforesaid. And the said Thomas M. D. Baden, as collector aforesaid, being so found indebted to the said William Clarke, in the said sum of eight hundred and five dollars, current money, then and there passed to the said William Clarke, his certain bill obligatory, for the payment thereof with interest, which said bill obligatory, sealed with the seal of him the said Thomas M. D. Baden, bearing date the day and year last aforesaid, is herewith brought into Court; and the said State, by its said attorney, further in fact saith, that the said several sums of money, so as aforesaid allowed by the justices of the Levy Court of said county, were assessed, laid and imposed by them on the inhabitants of said county, and the said Thomas M. D. Baden, as collector aforesaid, was required by the duties of his office, by reason of the premises, to collect and receive the same, for the use of the said William Clarke, to whom the same had been transferred and assigned as aforesaid. And the said State further saith, that although the said Thomas M. D. Baden, as collector aforesaid, after making the said writing obligatory, and before the issuing of the writ original, of the said State against the said defendants in this cause, did collect and receive the said sums of money amounting as aforesaid, to the sum of eight hundred and five dollars, current money, assessed, laid out and imposed as aforesaid; yet the said sums of money, or any part thereof, although often thereto required, &c.

168 * The single bill referred to, will be found in the bill of exceptions. The defendants rejoined.

1. And the said defendants, John R. Baden, &c., say, that the said State, its action aforesaid against them, to have or maintain ought not, because they say, that the said Thomas M. D. Baden, as collector as aforesaid, in said replication, did not collect and receive the said several sums of money, levies and assessments, mentioned in the said replication, or any of them as stated by the said State; and that the said sums of money, levies and assessments, were not

levied and imposed upon the inhabitants of the said county, as stated by the said State, nor were they, or any of them assigned to the said William Clarke, as stated in the said replication.

2. And the said defendants further say, by way of rejoinder, that the said Thomas M. D. Baden, as collector as aforesaid, did not account with the said William Clarke, in manner and form as stated in the said replication; and that he was not then and there found indebted upon said account, for the amount stated in the said replication, or for any other sum of money; and that he did not then and there give the note or bond, in manner and form as stated in the said replication.

3. And the said defendants further, by way of rejoinder, say, that the said note for eight hundred and five dollars, in said replication mentioned, was not given, and does not include the said several levies, assessments and sums of money mentioned in the replication as having been levied, as stated in the said replication, and assigned to the said William Clarke, and received and collected by the said Thomas M. D. Baden, collector as aforesaid; and that he did not collect and receive the same, or any part thereof, as alleged by the said State.

The plaintiffs sur-rejoined, that the matters and facts contained in the rejoinder of the said defendants are not true, and this the said State prays may be enquired of by the country, and the said defendants in like manner, &c.

The jury found that the said Thomas M. D. Baden, as collector as aforesaid, did collect and receive the said several sums of money, levies and assessments mentioned in the * replication of the said plaintiff, and that the said sums of money, levies and assessments, were levied and imposed upon the inhabitants of the said county, as also stated by the said plaintiff, and were assigned to the said William Clarke, as stated in the said replication. And that the said Thomas M. D. Baden, as collector as aforesaid, did account with the said William Clarke, in manner and form as stated in the said replication, and that he was then and there found indebted upon said account, for the amount stated in the said replication, and that he did then and there give the note or bond, in manner and form as stated in the said replication of the said plaintiff. And that the said note of eight hundred and five dollars in said replication mentioned, was given for, and does include the said several levies, assessments and sums of money, mentioned in the said replication, as having been levied and assigned to the said William Clarke, and received and collected by the said Thomas M. D. Baden, collector as aforesaid, and that he did collect and receive the same as alleged by the said State in its said replication. And they do therefore, find the sum of one thousand and fifty-seven dollars and thirty-six cents, current money, really and justly due to the said plaintiff, on the writing obligatory aforesaid.

The defendants moved the Court to arrest the judgment in this case, for the following reasons :

1. Because the condition of the bond sued upon, does not cover the breaches assigned in the replication.

2. Because the plaintiff is not entitled to judgment in the present state of the pleadings.

3. Because the breaches assigned in the replication are not within the condition of the bond sued upon.

4. Because the replication should have stated, and set out the names of the several and respective parties, for whose use the several sums of money and levies were made and levied, mentioned and referred to in the replication, and the several amounts levied for each individual and person; and also, because the said replication does not state that these several sums * and levies were as-
170 signed in writing to the said William Clarke, as it should have done.

The County Court overruled the motion in arrest, and rendered judgment on the verdict.

At the trial of this cause, the plaintiff to sustain the issues joined on its part, offered in evidence to the jury the following paper:

§805. I promise to pay to William Clarke, or order, the sum of eight hundred and five dollars, for value received, with interest, the same being for county paper due for the year 1836-7. Witness my hand and seal, the 28th July, 1837.

T. M. D. BADEN, [Seal.]

Test,—John R. Baden.

Collector P. G. County.

And proved by a competent witness, that the same was signed by the said T. M. D. Baden, the collector as aforesaid, at the time it purports to bear date, and there rested its case.

The defendants objected to said evidence, that the same standing alone and unsupported by other evidence, was not sufficient to entitle the plaintiff to a verdict. But the Court [STEPHEN, C. J. and KEY, A. J.,] overruled the objection, and were of opinion, and so instructed the jury, that the said evidence, if believed by them, would be sufficient in the absence of contradictory evidence, to entitle the plaintiff to a verdict on all the issues joined, against all the defendants in this cause. The defendants excepted, and prosecuted this appeal.

The cause was argued before ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

T. S. Alexander and *O. C. Magruder*, for the appellants.

R. Johnson and *T. F. Bowie*, for the appellees.

DORSEY, J. delivered the opinion of this Court. It is true that on the first trial of this case, which took place in the County Court, the only issue to be tried by the jury was, whether Thomas M. D.

Baden had collected and received the *sum of money, for the recovery of which, the action was instituted. But do the issues tried by the last jury at all vary, in respect to those issues, the effect and operation ascribed by this Court to the testimony adduced by the appellee on the first trial? We think that they do not. If the promissory note or certificate of indebtedness given by Thomas M. D. Baden, the collector, was an implied admission that he had collected and received the amount therein specified, it was equally an implied admission that the same had been levied, and the levies transferred to William Clarke. Upon no other ground than his acknowledgment of the existence of those facts, can his giving such a note or certificate be accounted for. Such admissions by the collector having been determined by this Court, in the first trial before it, to be *prima facie* evidence against the collector and his securities, the County Court proceeding with the trial under the *procedendo*, could not do otherwise than overrule the objection made to the testimony; and was fully justified in the instruction which it gave to the jury.

Two reasons have been urged why the judgment of the County Court ought to have been arrested. The first is, that "the replication is uncertain in its statement of the persons for whom the levies mentioned therein, were made, and the sums respectively allowed to them." Whether this objection to the replication, if taken by the proper demurrer, in the Court below, should have been sustained, we mean to express no opinion. But as it was taken in arrest of judgment, it was correctly overruled. If as insisted, it was necessary that the replication should state the amount of each levy, and the name of the person for whom it was made; and that proof thereof must be offered to enable the jury to find the verdict which they did; after the finding of the verdict on the motion in arrest, the Court are bound to assume, that such testimony was given to the jury however false, in point of fact that assumption might be. In acting on a motion to arrest the judgment, the Court is not to look to the bills of exceptions, or out of the other proceedings in the cause as exhibited by the record, in forming its presumption of the proof which had been submitted to the jury.

* Similar reasons may be assigned for overruling the second ground, relied on for arresting the judgment; which ground was, "that there is no sufficient averment of a legal transfer and assignment of said levies to William Clarke, and consequently no title in him to demand payment thereof." It was not necessary, as has been insisted, that such transfer to be valid, must have been in writing.

If the consequences of the affirmance of this judgment be so disastrous to the interests of the appellants, (the securities) as it has been represented they may be, they certainly had the means of avoiding the dilemma in which it is said, they are now involved, had

they used them at the proper epoch in the cause. Had a special demurrer to the replication, assigning as the grounds of its insufficiency, that it did not state the amounts of the several levies, and the names of the persons for whom made, been overruled by the County Court, a knowledge of those facts, so essential to the defence of the securities, could readily have been obtained in time for them to make their defence, and prepare for the trial, by an application to the Court for an order requiring the appellee to file a bill of particulars of his claim.

Approving of the conduct of the Court below, in overruling the motion in arrest of judgment, and the objection stated in the bill of exceptions, to have been raised to the testimony offered by the appellee, and also approving of the instruction given by the Court to the jury, we affirm its judgment.

Judgment affirmed.

CHARLES DUVALL vs. SAMUEL PEACH.—December, 1843.

At a sale of land under execution, P. agreed with D. that if D. would purchase the land, he the said P. would invalidate certain deeds therefor, and put him in possession. *Held:* that this agreement being merely by parol, is void at law under the Statute of Frauds. (a)

P. at a public sale of lands, the bidding being dull, said, buy the land gentlemen; buy the land D.; I will burst the deeds from N.; I will give you
173 a * good title; and will put you in possession of the land; it shall not cost you a cent. Under such representations, D. bought the land and paid for it in 1836. In an action brought in 1840, by D. against P. to recover back the purchase money upon the ground that P. had failed to vacate the incumbrances and put D. in possession, there being no proof of any proceedings on the part of P. nor that he had given possession. *Held:* that the action was barred by limitations.

To remove the bar raised by the Statute of Limitations, there must be such an acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit, or promise to pay. (b)

Where a record of proceedings in Chancery does not appear in the bill of exceptions, this Court cannot decide whether the County Court erred in rejecting it as evidence or not. (c)

A party in a cause cannot prove by a solicitor in Chancery, that in the opinion of such solicitor, judging by an examination of certain proceed-

(a) Distinguished in *Baker vs. Wainwright*, 36 Md. 352. See *Lamborn vs. Watson*, 6 H. & J. 207. In *Baker vs. Wainwright*, the Court said that the point decided in the case in the text was that an agreement to establish the title to land in a party is equivalent to an agreement to sell him the land, and an engagement to break down a certain alleged title, under which a third party claimed adversely, or in any way to perfect the title in the promisee, is within the Statute.

(b) Approved in *Carroll vs. Ridgaway*, 8 Md. 336; *Stockett vs. Sasser*, 8 Md. 378. See *Oliver vs. Gray*, 1 H. & G. 142, *note*.

(c) Cited in *Bryan vs. Coursey*, 3 Md. 67; *Clemens vs. Baltimore*, 16 Md. 212.

ings in that Court to vacate conveyances, (without producing the record,) that he had used reasonable diligence to accomplish the object of such proceedings.

Parol proof of facts of which the plaintiff had record evidence cannot be given; it is not the best evidence in legal contemplation. (d)

APPEAL from Prince George's County Court. This was an action of assumpsit, brought on the 24th March, 1840, by the appellant against the appellee.

The plaintiff declared, that whereas, the said Samuel, on the 4th December, 1826, at, &c., issued a certain writ of *venditioni exponas*, upon a judgment obtained by him, the said Samuel, at, &c., against a certain Nathan Waters, for the recovery of a large sum of money, to wit, &c., and placed the same in the hands of George Semmes, Esquire, the then sheriff of said county, directing him thereby to expose to public sale, for the purpose of satisfying said debt and costs, all those tracts or parts of tracts or parcels of land which had theretofore been levied upon, under a certain writ of *feri facias*, which the said Samuel had caused to be issued out of said Court, on, &c., at, &c., to wit, one tract of land called Pasture Enlarged, &c., &c., all of which said tracts or parts of tracts or parcels of land, were by virtue of said writ of *venditioni exponas*, afterwards, to wit, on the 30th December, 1826, at Prince George's County aforesaid, by the sheriff aforesaid, exposed to public sale, to the highest bidder; at which said sale, the said Charles, then and there became the purchaser, upon the * express promise and undertaking of him, the said Samuel, that if he, the said Charles, would purchase 174 the said lands as aforesaid, he, the said Samuel, would invalidate the the deeds for said lands, which had been before that time executed by the said Nathan, to a certain Nathan J. Waters, and a certain Samuel Radcliffe, under which the said Nathan J. and Samuel Radcliffe, claimed to hold the same as their property, and would put the said Charles in possession of said lands, so as aforesaid purchased by him; and the said Charles in fact saith, that the said Charles, confiding in the promise and agreement of the said Samuel, so as aforesaid, then and there made, then and there became the purchaser of the said tracts, parts of tracts or parcels of land; for large sum of money, to wit, thirteen hundred and fifty dollars, current money, which said sum of money, the said Charles, on the aforesaid 30th day of December, 1826, paid to a certain Richard Peach, the agent and attorney for the said Samuel Peach. But the said Samuel, not regarding or fulfilling his said contract or agreement, by vacating or annulling the said deeds, or either of them, and hath not yet put the said Charles in possession of the said lands, so as aforesaid purchased by him, or any part thereof, but to perform his said contract or

(d) See *Mulliken vs. Boyce*, ante, m. p. 60, note (b.)

agreement in that respect, he hath hitherto altogether refused, and still doth refuse to perform the same.

2nd Count.—And whereas also, the said defendant, heretofore, to wit, on the 30th December, 1826, did encourage and persuade the said plaintiff to buy at the sheriff's sale in the first count mentioned, the tracts, parts of tracts and parcels of land also therein mentioned, and in consideration that the plaintiff would purchase the said lands at the said sale, the said defendant undertook and faithfully promised the plaintiff, that the said lands were the proper lands of Nathan Waters, also therein mentioned, and warranted the said lands to belong to the said Nathan Waters, and undertook and promised, that he, the said defendant, would set aside, invalidate and annul certain deeds for the same, also in the first count mentioned, and put said plaintiff in possession thereof, and give him a good

175 * title thereto, without any cost or charge to him, and by means and in consequence of the said promises and undertakings, and warranty, and relying on, and confiding in the same, the said plaintiff became the purchaser of the said lands, at the said sale, at a large price, to wit, \$1,350, which he then and there paid to the authorized agent and attorney of the said defendant; whereas, the said lands in truth and fact did not belong to the said Nathan Waters, but to the said Nathan J. Waters, and Samuel Radcliffe: and the said Nathan J. and Samuel, were afterwards, to wit, on the day and year aforesaid, at the county aforesaid, impleaded by the said plaintiff, with the knowledge, consent and approbation of defendant, in the High Court of Chancery, for trying the title to said lands, and to put the plaintiff in possession thereof, in pursuance of said undertakings and promise, and warranty, and the said cause was so proceeded in, that afterwards, at the December Term, 1839, of the Court of Appeals for the Western Shore of Maryland, (to which Court said cause was carried on appeal,) upon a final hearing and decision of said cause upon the merits thereof, the said deeds were not vacated, annulled and invalidated, but the proceedings instituted for that purpose were decreed to be dismissed, and in the prosecution of said cause in the Court of Chancery, and in the Court of Appeals the said plaintiff has expended a large sum of money, to wit, two thousand dollars, and the said deeds have not, nor have any of them been set aside, invalidated or annulled, nor has a good title thereto been made to the plaintiff by the defendant, or any other person, by reason whereof the said plaintiff has lost the said sum of \$1,350, so paid as aforesaid, for the said lands, and the further sum of \$2,000, expended as aforesaid in trying the title to said lands, and is otherwise prejudiced and injured, and has damage to the value of \$5,000, and therefore sues, &c.

3rd Count.—And whereas also, the said Samuel, afterwards, that is to say, on the 20th of March, 1840, at the county aforesaid, was indebted to the said Charles, in another sum of \$1,350, current money,

for the like sum of money by the said Samuel, before that time had and received, to and for the use * of the said Charles, and also, for a like sum of money, before that time lent and advanced to, **176** and paid, laid out and expended, by the said plaintiff, for the said defendant, and at his special instance and request, and being so indebted, he, the said Samuel, in consideration thereof, afterwards, that is to say, on the day and year last aforesaid, at the county aforesaid, undertook, and then and there faithfully promised to the said Charles, to pay him the said mentioned sums of money, when he should be thereto afterwards requested. Nevertheless, &c.

The defendant pleaded *non assumpsit* and limitations, on which issues were joined.

1st Exception. At the trial of this cause the plaintiff to maintain the issue on his part joined, proved to the jury, that at the April Term, 1824, of Prince George's County Court, Samuel Peach, the defendant in this cause, recovered a judgment against a certain Nathan Waters and the other parties to it, upon a bond given to him as trustee.

Samuel Peach vs. Nathan Waters. April 12th, judgment for \$14,485, debt and costs, to be released on payment of \$7,247.87½, with interest from 21st September, 1811, till paid, and costs. . Cr. By \$1,400, 29th March, 1822. By \$1,105.89, 3rd April, 1824.

And that process of execution issued from said Court for the purpose of making the money due on said judgment, which came to the hands of the sheriff of Prince George's County, and was levied upon certain lands as the property of the said Nathan Waters; and the plaintiff proved by Richard W. Isaac, a competent witness, that he was deputy sheriff, and charged with the execution of said process, and caused the said lands to be advertised for sale on the 30th day of December, 1826; that on the day before the said sale was to take place, witness went to the defendant to know whether it would be necessary for him the witness to attend the said sale, and whether he the defendant would attend; that the defendant informed witness that he would not attend the sale, but his brother Richard Peach, would come from Annapolis and attend the sale for him the defendant, and that he the defendant had fully authorized his * said brother to settle the business, and that he would be satisfied **177** with whatever settlement his brother made in relation to the business. On the day of the sale Richard Peach, who was proved to be the attorney for defendant, and who obtained the judgment, was present, and the bidding being dull, he said, "buy the land gentlemen;" "buy the land doctor," (speaking to the plaintiff,) "I will burst the deeds from Nathan Waters to Nathan J. Waters and Samuel Radcliffe; I will give you a good title, and I will put you in possession of the land, and it shall not cost you a cent." And plaintiff became the purchaser of said lands for the sum of \$1,350. And witness further stated, that he did not receive any part of the purchase

money, but that the said Richard Peach, as attorney, gave him a receipt on the day of sale in satisfaction of the said execution, stating at the same time, that he and the purchaser would settle about the purchase money among themselves. Witness further proved, that he called on defendant some time in the year 1827 or 1828, in relation to the payment of the poundage fee due on said execution, when defendant informed him, that the purchase money for said lands had been paid, and the land settled for. Witness further stated, that he called on defendant the day before said sale as above stated, because he believed there would be no sale of said property, unless the said defendant attended at said sale. No person had bid for the land, until the said Richard Peach had made the above declarations, and shortly after they were made, the said lands were knocked off to the said Charles Duvall, as the highest bidder. And the plaintiff further proved by competent testimony, that the defendant in this cause was examined under oath, in virtue of a commission issued in 1837, from the Court of Chancery, in a cause wherein the plaintiff in this case was complainant, and Nathan Waters and others were defendants, instituted by the plaintiff, for the purpose of vacating the deeds heretofore referred to, and upon said examination, and in conversations with the witness. defendant stated, that he was satisfied with the application of the purchase money by said R. Peach, and

178 * the said witness upon cross-examination stated, that in said conversations, he understood defendant to say, that his brother Richard Peach, had acted as his attorney. The said deputy sheriff also proved on cross-examination, that on the day of sale, R. Peach did not represent himself as the agent of the said defendant, and that he did not hear the defendant's name mentioned on that day.

The defendant thereupon prayed the Court to give to the jury the following instructions;

1. That Richard Peach, as the mere attorney of Samuel Peach, had no authority to make the contract declared on in this cause.

2. That if the jury shall believe from the evidence, that Richard Peach did enter into the agreement mentioned in the declaration, that said agreement is not binding on Samuel Peach, unless the jury shall further find from the evidence, that Richard Peach was authorized by Samuel Peach, to make as his agent such a contract, and that he did, in pursuance of such authority, actually make the contract as the agent of the defendant.

3. That the alleged contract being a contract concerning lands, would not be binding on Samuel Peach, unless it was reduced to writing, and signed by Samuel Peach, or by some agent thereunto by him lawfully authorized.

4. That the said contract was not, in the contemplation of the parties, to be completed within one year from the date thereof; then that the same was void, unless reduced to writing, and signed by Samuel Peach, or his lawfully authorized agent.

The Court (STEPHEN, C. J. and KEY, A. J.) granted the first, second and third prayers, but refused to grant the fourth prayer. The plaintiff excepted to the instructions granted.

2nd Exception.—Upon the evidence contained in the preceding bill of exceptions, which is to be considered as part of this exception, the plaintiff prayed the Court to instruct the jury, that if they should find from the evidence, that there was an agreement between the plaintiff and Richard Peach, as the authorized agent of the defendant, and in virtue of said agreement * the plaintiff purchased the land, as stated in the preceding exception, and **179** paid the purchase money to the said defendant or his agent, and that the said agreement had not been complied with on the part of the defendant, that the plaintiff is entitled to recover upon the count for money had and received, although they should find that the said agreement was not in writing, and signed by the defendant, or some person by him fully authorized; which instruction the Court gave. The defendant by his counsel, thereupon prayed the Court to instruct the jury, that if they should find from the evidence, that the agreement was made, and the purchase money paid on the 30th December, 1826, and that the original writ in this cause did not issue until the 1st day of March, 1840, that then the action is barred by limitations, unless they should find some subsequent assumption or promise by the defendant, either to repay the money or perform the said contract, and they must find for the defendant, which prayer the Court granted, and gave the instruction accordingly. The plaintiff excepted.

3rd Exception.—In addition to the testimony contained in the preceding bills of exceptions, and which is to be considered as part of this bill of exceptions, the plaintiff, for the purpose of removing the bar of the Statute of Limitations, offered to prove by Thomas F. Bowie, Esquire, an attorney and counsellor at law and solicitor in Chancery, a competent witness in this cause, that he is acquainted and familiar with the practice and course of proceedings in Courts of law and Chancery in Maryland, and that he has examined certain records of proceedings instituted in Prince George's County Court, the Court of Appeals, and the Court of Chancery, by the plaintiff in this action, first, for the purpose of getting possession of the lands mentioned and referred to in the preceding evidence, and afterwards, for the purpose of vacating and annulling certain deeds for the said lands from Nathan Waters to Nathan J. Waters, and Samuel Radcliffe, and that he was solicitor for said Duvall in said cause and proceedings from the year 1835 to 1839, and that from the knowledge of the course and manner of said proceedings in the said County Court, Court of Chancery, and * the Court of **180** Appeals, and in his opinion, judging by his examination of the said proceedings instituted and conducted by the plaintiff as aforesaid, the said plaintiff had used reasonable diligence in his

efforts to acquire possession of the said lands under the said purchase and agreement, and to set aside and vacate said deeds, and procure a good title to the same. And the plaintiff further offered to prove by the said witness, that the said proceedings were first commenced by the said Duvall, the plaintiff in this case, in the year 1827, or 1828, or 1829, as he knows by inspection of the record, and were continued by him in the County Court, Court of Chancery, and Court of Appeals, continuously down to the year 1839. And the said plaintiff also offered in evidence, a duly authenticated record of the proceedings in the Court of Appeals, on an appeal from Chancery, wherein the said Charles Duvall was complainant, and the said Nathan Waters and others were defendants, in which cause the validity of said deeds had been in issue in the said Courts between the present plaintiff claiming under the sheriff's sale and agreement aforesaid, and those claiming title to the said lands under the aforesaid deeds, for the purpose of shewing when said proceedings commenced and ended, and that the issues involved in the cause embraced the validity of said deeds. But the defendant, by his counsel, objected to the admissibility of the said evidence, which objection the Court sustained, and refused to permit any of the said evidence to go to the jury. The plaintiff excepted.

The verdict and judgment being against the plaintiff, he prosecuted this appeal.

The cause was argued before AROHER, DORSEY, and SPENCE, JJ.
Digges and Tuck, for the appellants.
Pratt and C. C. Magruder, for the appellee.

SPENCE, J. delivered the opinion of this Court. After a careful examination of the several legal propositions decided by the County Court and brought up to this Court for revision, we are prepared to say, that in them we find no error.

181 * The first and second propositions under the first bill of exceptions appear to us so manifestly clear, that we find great difficulty in suggesting arguments or reasons which will render their correctness more conclusive.

The third proposition arising under the first bill of exceptions, raises the question, whether the agreement set out in the declaration and relied on by the plaintiff, is such an agreement as is within the Statute of Frauds. The parol agreement, or rather that part of the agreement relied on, to charge the defendant as set out in the plaintiff's declaration, is as follows, viz: "At which said sale, the said Charles then and there became the purchaser, upon the express promise and undertaking of him the said Samuel, that if he the said Charles would purchase the lands as aforesaid, he the said Samuel would invalidate the deed for said lands, which had been before that time executed by the said Nathan to a certain Nathan J. Waters

and a certain Samuel Radcliffe, under which the said Nathan J. and Samuel Radcliffe claimed to hold the same as their property, and would put the said Charles in possession of said lands so as aforesaid purchased by him; that the said Charles confiding in the promise and agreement of the said Samuel, so as aforesaid, then and there made, then and there became the purchaser, &c."

We are fully persuaded that this agreement falls entirely within that class of cases which the authorities determine to be agreements within the Statute of Frauds, and in principle almost identical with *Lamborn vs. Watson*, 6 H. & J. 252.

The second exception presented a question under the Statute of Limitations. The Court instructed the jury "that if they should find from the evidence that the agreement was made and the purchase money paid on the 30th December, 1826, and that the original writ in this cause did not issue until the 1st day of March, 1840, that then this action was barred by limitations, unless they should find some subsequent assumption or promise by the defendant, either to repay the money or perform the said contract." In Maryland, to remove the bar raised by the Statute of Limitations, there must be such an * acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit or promise to pay. 182

This Court cannot decide whether the County Court erred in refusing to let the record of the proceedings in the Court of Appeals, on an appeal from Chancery, wherein Charles Duvall was complainant and Nathan Waters and others were defendants, go to the jury, because that record is not made a part of the third bill of exceptions, nor is it in the record; but we think the County Court did not err in refusing to let the testimony of Thomas F. Bowie go to the jury, because that was parol evidence of facts of which the plaintiff had record evidence, and therefore was not the best evidence in legal contemplation. Judgment affirmed.

E. R. and F. KEEFER vs. WILLIAM H. MATTINGLY—December, 1843.

This Court is limited by the Act of 1825, ch. 117, to the consideration of the questions presented to the County Court upon the bills of exceptions.

An instrument of writing in the following words, viz: "we hereby bind ourselves to pay W. all that we receive over \$400 of the C. and O. C. Company in our cases against said L. and M.," signed by the defendant, does not *per se* contain evidence of a consideration.

But the connexion of this paper with other proof leading to the inference, that the plaintiff in the action had forborne to defend certain actions depending at the time of its execution, and in consequence of, and reliance upon it, allowed judgments to be rendered, is sufficient evidence of a consideration for its execution, proper to be left to the jury. (a)

(a) Cited in *Andre vs. Bodman*, 18 Md. 255.

The Court is the proper tribunal to construe and determine the legal effect and construction of instruments of writing: but where deductions are to be drawn from the conduct of parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions.

L. assigned to M. his claim against the C. and O. C. Company. At this time K. had an attachment pending against the funds of L. in the hands of the company, and shortly afterwards agreed to pay M. all sums he should receive over and above the sum of, &c. In an action by M. against K. to recover such surplus, the assignment from L. to M. is admissible evidence, as a basis for the introduction of the agreement between M. and K. and calculated to explain the reasons for that agreement.

183 *APPEAL from Frederick County Court. This was an action of assumpsit, commenced on the 30th August, 1841, by the appellee against Ezra R. and Michael Keefer, partners, trading under the firm of E. R. & M. K. The plaintiff declared upon an indebtedness for sundry articles and matters properly chargeable in account; and upon the money counts. The defendant pleaded non assumpsit, on which issue was joined.

1st Exception.—At the trial of the cause, the plaintiff, to support the issues joined on his part, offered in evidence to the jury, short copies of two judgments of condemnation, rendered in the Circuit Court of Washington County, in the District of Columbia, against the Chesapeake and Ohio Canal Company, accompanied with a letter from Brent and Brent. They then offered in evidence by Thomas Turner, a competent witness, that on the 16th day of December, 1840, Ezra R. Keefer, one of the plaintiffs in said judgment, (and who was admitted to be one of the firm of E. R. & M. Keefer,) received on said judgments from the Canal Company, the sum of \$1,217, in full of said judgments, which receipts are annexed to said judgments, the execution of which receipts are admitted.

Circuit Court of Washington County, District of Columbia. *Michael Keefer and Ezra R. Keefer vs. The Chesapeake and Ohio Canal Co., garnishees of Leckie and Mattingly.* November Term, 1840. 14th December, judgment of condemnation for \$744.06, and costs. Costs, \$15.63.

Dec. 15th, 1840.	Test,	W. BRENT, Cl'k.
\$744 06	Examined and passed,	J. MCPHERSON,
445 52		JACOB MARKELL.
<hr/>		
1,189 58		
5		
<hr/>		
\$59.47,90		

* COURT ROOM, Washington City, Dec. 14, 1840.

Gentlemen,—The short copy above and the one on the other **184** side, will enable you to receive the amounts or the judgments from the Chesapeake and Ohio Canal Company. Our fee is five per cent. upon the amount, which will be \$59.47. The costs in both suits amount to \$28.50, from which deduct \$10 deposited, will leave \$18.50, which added to our fee, will make \$77.97, which please to forward to us by a check on one of our banks, or enclose to us in notes of your bank, evidenced by some person to have been placed in the post-office. Yours respectfully,

BRENT & BRENT.

Addressed to Messrs. E. R. and M. Keefer, Frederick Town.

Circuit Court, Washington County, District of Columbia. *Michael Keefer and Ezra R. Keefer vs. The Chesapeake and Ohio Canal Co., garnishees of Samuel A. Leckie and William Mattingly.* November Term, 1840. 14th December, judgment of condemnation for \$442.52, and costs. Costs 12.87.

Test,

W. BRENT, Clk.

December 15th, 1840. Examined and passed,

\$59 47

\$12 87

J. MCPHERSON,

18 50

15 63

JACOB MARKELL.

\$77 97

\$28 50

Received December 16th, 1840, in full of the annexed judgments, twelve hundred and seventeen dollars and ninety cents, of Thomas Turner, Clk. C. & O. C. Co. in scrip of December 9th, payable 9 months after date, with interest.

E. R. & M. KEEFER.

Passed by order of the board 15th December, 1840.

THOS. TURNER, Clk.

CANAL OFFICE, Frederick, July 1, 1843.

I certify the foregoing to be a true copy of an original paper on file in this office.

Test,

THOS. TURNER,

1st Judgment \$744 06

Clk. C. & O. C. Co.

Cost 15 63

2nd. do. 444 52

Cost 12 87

\$1,217 08

*The plaintiff then further to support the issue on his part joined, offered in evidence the following paper, the due **185** execution of the same by E. R. & M. Keefer, the firm aforesaid, having been admitted:

FREDERICK, December 11, 1840.

We hereby bind ourselves to pay William H. Mattingly all that we receive over \$400 of the Chesapeake and Ohio Canal Company, in our cases against said Leckie and Mattingly.

E. R. & M. KEEFER.

The plaintiff then offered in evidence to the jury, a paper purporting to be an assignment from S. H. Leckie to William H. Mattingly, the plaintiff, of all the right, title and interest of him the said S. H. Leckie, of and in all his claims against the Canal Company, the execution of which paper is admitted, viz:

"For value received, I hereby assign, transfer and convey unto William H. Mattingly, his executors, administrators or assigns, all claims and demands, both at law and in equity, which I now have or may at any time heretofore have had, against the Chesapeake and Ohio Canal Company, arising under my contract with said company, for the construction of section No. 279 of the canal, and all my interest in the suit pending in my name against the said company in the Circuit Court for Washington County, in the District of Columbia, and in judgment or judgments which may be obtained in said suit; and all my interest in the 20 per cent. or 'back money' retained out of the estimates for work done on said section, by the undersigned and the said Mattingly, as partners; and finally, all my right, title and interest of every description, appertaining to said section, and all my claims of every kind against the said company. In witness whereof, I have hereunto set my hand and affixed my seal, this third day of October, in the year of our Lord one thousand eight hundred and forty.

S. H. LECKIE, [Seal.]"

To the admissibility of which last paper the defendant objected, but the Court [BUCHANAN, C. J., and BUCHANAN, A. J.,] overruled the objections and admitted the said paper to be read to the jury. The defendants excepted.

186 *2nd Exception.—In this case, the defendants by their counsel, upon the evidence offered in the first bill of exceptions, which is to be taken as part of this their second bill of exceptions, prayed the Court to instruct the jury, that upon all the evidence offered to the jury, the plaintiff is not entitled to recover, because there is no sufficient consideration for the promise or agreement made by Ezra B. and Michael Keefer to pay to William H. Mattingly all they might receive over \$400 of the Chesapeake and Ohio Canal Company, in their cases against Leckie and Mattingly; but the Court were divided in their opinion as to the direction prayed for as aforesaid; wherefore they did not give the opinion and direction prayed for by the defendants. The defendants excepted.

The verdict and judgment being for the plaintiff, the defendant prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

Palmer, for the appellants. F. A. Schley, Dulany, and Addison, for the appellees.

ARCHER, J. delivered the opinion of this Court. Various questions have been discussed in this cause, which we think do not legitimately arise on the record. We are limited by the law of 1825, chap. 117, to the consideration of the question presented to the Court below. To this we shall confine our judgment. The Court were called upon to say, there was no sufficient evidence of a consideration proved in the case. The writing signed by the defendants binding themselves to pay to the plaintiff whatever sum they should receive in their cases against Leckie and Mattingly, of the Chesapeake and Ohio Canal Company, does not in itself contain evidence of a consideration, and if the action had been founded on this instrument, it would have been necessary to have had proper averments of a consideration. By the evidence offered by the plaintiff, it appears that the defendants had instituted two actions by attachments in the Circuit Court for the County of * Washington, 187 in the District of Columbia, against Leckie and Mattingly, and laid the same in the hands of the Chesapeake and Ohio Canal Company, which actions had been instituted to the November Term of that Court in the year 1840, and were depending at the time of the execution of the writing referred to. The claim of the defendants in those actions amounted as is demonstrated by the judgments obtained, to the sum of \$1,189.85. That the writing refers to these cases is obvious by the designation of the parties, and the absence of evidence of any other controversy depending in any Court between the parties. From this writing it may be inferred, that the extent of the defendant's claim in those suits was adjusted, and the balance ascertained to be due them was \$400. Then the defendants, by the same writing, bind themselves to pay to the plaintiffs all over the \$400 which they should receive from the Canal Company in these cases. Two days after this, a judgment of condemnation is entered for the whole extent of the claim, and canal scrip on the fourth day after the agreement, is received for the whole amount of the judgments. Is it not a legitimate inference from these proceedings of the parties, that Mattingly forebore to defend the attachment cases in the Circuit Court, and in consequence of the agreement and in reliance upon it, allowed the judgment to go against the Canal Company? If but \$400 was due to the plaintiffs from Leckie and Mattingly, they might successfully have resisted the condemnation beyond that sum, which they forebore to do, in consequence of the agreement relying on the defendant's willingness and ability to pay them whatever they should recover of the Canal Company, beyond the \$400. We think therefore there was sufficient evidence of a consideration proper to be left to the jury. The Court it is true, is the proper tribunal to construe and determine the legal effect and construction of instruments of writing; but when deductions are to be drawn from the conduct of the parties in the execution of such instruments, at the time, in the manner, and under the circumstances,

existing in the case, the jury are the proper forum to make such deductions. We therefore think it was properly a *question
188 for the jury to determine whether a consideration existed in the case, and there was sufficient evidence before them for this purpose.

We also think the Court were right in allowing the assignment from Leckie to Mattingly to be offered in evidence. It formed a proper basis for the introduction of the agreement of the defendants which was offered in evidence, and was calculated to explain the reason for the defendants contracting entirely with the plaintiff in relation to the surplus over \$400, to be received by the defendants on their attachments against Leckie and Mattingly.

Judgment affirmed.

DUDLEY LEE vs. JOHN HOYE's Lessee.—December, 1843.

Extracts from record books deposited in the land office, showing the name and rank of grantee, and number of the lot and acres, with a particular description of such lot as surveyed, to which an officer or soldier of the Revolution was entitled, which books purport to have been made under the authority of the Act of 1788, ch. 44, with a certificate from the register of the land office, under his seal of office, that the same have been carefully collated and compared with the original record books from which they were respectively taken and agreed therewith, are sufficient evidence to show title in the person named in such extracts, to the lot therein described.

An escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. (a)

It is not necessary nor usual, according to the practice of the land office, to state on the face of an escheat patent whose lands were escheated, or the facts or circumstances which show that the lands were escheatable.

A patent which professed to grant, as escheat, several parcels of land which it described, with contiguous vacancy, cannot include, as such vacancy, another parcel of land which appeared to have been theretofore granted by the State, and not enumerated as one of the parcels escheated. (b)

The Court will not instruct the jury after a lapse of seventeen years merely, to presume the death of the patentee of land.

A death of a patentee will not be presumed to support a title to land, acquired in violation of the law, and rules of the land office.

Before a title can be acquired in lands liable to escheat, the rules of the land office require that two-thirds of the value of the land be paid to the State.

A warrant of re-survey should be founded upon a seizin in fee in the lands upon which the re-survey is to be made.

(a) Approved in *Armstrong vs. Bittinger*, 47 Md. 110. Cited in *Goodwin vs. Caton*, 4 Md. Ch. 161. See *Hall vs. Gittings*, 2 H. & J. 99; *Cunningham vs. Browning*, 1 Bland, 299.

(b) Cited in *Smith vs. Baker*, 4 Md. Ch. 29.

A partial possession of land, with a general claim of title for fifteen years, will not authorize the presumption of a conveyance to such claimant.

* **APPEAL** from Allegany County Court. This was an action of ejectment, for a tract of land called Flavia, brought on the 10th February, 1840. The demise was laid on the 1st January, 1839. **189**

The defendant pleaded *non cul*, and took defence according to his pretensions, as they shall appear to be laid down on the return of a warrant of resurvey to be issued in this cause, &c.

1st Exception.—The plaintiff to support the issue on his part joined in this case, offered in evidence the plats and explanations. He also offered in evidence the following certificates and extracts from the books of the Land Office :

STATE OF MARYLAND, *Sct*: I, George G. Brewer, register of the Land Office for the Western Shore of the State of Maryland, do hereby certify that there is deposited in and belonging to the office aforesaid, a certain record book, entitled, "Record of the Officers and Soldiers entitled to land westward of Fort Cumberland, in Washington County, with the numbers of the lots drawn for them, agreeably to an Act of the General Assembly, passed November Session, 1788."

Received into the Land Office the 14th November, 1789, by John Callahan, Reg. L. O. W. S.

And that the said record book, in a certain part thereof, under the caption of "Soldiers entitled to land westward of Fort Cumberland," contains among others, the following entries, to wit, viz:

<i>Names.</i>	<i>Rank and Regiment.</i>	<i>No.</i>
John Kidd.	P.	4 1225.

And I do hereby further certify, that another record book, deposited in and belonging to the office aforesaid, entitled, Ledger A, and received into the said Land Office, according to the following receipt upon the first page thereof, to wit:

Received into the Land Office as a record, agreeably to the directions of an Act of Assembly, to dispose of the reserved lands westward of Fort Cumberland, in Washington County, &c., passed November Session, 1788.

Test, JNO. CALLAHAN, Reg. L. O. W. S.

* And in a certain part thereof, contains as follows, to wit:

December 10th, 1787. In compliance with a resolution of **190** the General Assembly of the State of Maryland, of the 20th May, 1787, and a commission from the Governor and Council, to me directed, bearing date the 11th June, 1787, for the purpose of surveying and laying out the reserve land, to the westward of Fort Cumberland, into convenient lots of 50 acres each, &c.

I hereby certify that I have carefully surveyed for the State aforesaid, 4165 lots of 50 acres each, lying and being in Washington County and State aforesaid, and on the manors, reserves and con-

fiscated lands, to the westward of Fort Cumberland, as will appear by a general plat thereof, and certificates numbered in rotation from 1 to 4165, in this book and another titled Ledger B.

Per

FRANCIS DEAKINS.

And also the following entry, to wit:

No. 1225. Beginning at end of the second line of lot 1224, and running northwest ninety-seven perches, south twenty-six degrees, west one hundred and twenty-two perches, to the end of the second line of lot 1222, and with it reversed, south seventy-eight degrees, east sixty-eight perches, then by a straight line to the beginning, containing fifty acres.

And I do further certify that the foregoing entries have been severally compared and collated with the said original record book, from which they have been respectively taken, and that they agree and correspond therewith.

In testimony whereof, I have hereunto set my hand and affixed my [Seal:] official seal, this 6th day of October, 1841.

GEORGE G. BREWER, Reg. L. O. W. S., Md.

Similar certificates were offered in evidence for lots

No. 1226 granted to Timothy Langrel,

" 1229 " to John King,

" 1230 " to William King,

" 1231 " to George Elms,

" 1235 " to James Driver.

For the purpose of shewing title in the respective persons, named in said papers to the respective lots of land claimed in this action, at the time said papers or entries were made, to * the sufficiency **191** of which said extracts from said books of the Land Office, for such purpose, the defendant by his counsel objected, on the ground, that the said extracts did not furnish sufficient evidence to shew that the said lots of land had been allotted to the respective persons therein named, by the commissioners, under and in conformity to the provisions and requirements of the Act of Assembly of 1788, chapter 44, so as to vest the legal title to said lots in said persons respectively, but the Court [BUCHANAN, C. J. and BUCHANAN, A. J.] was of opinion, and so instructed the jury, that the said extracts were legally sufficient for the said purpose for which they were offered, to which opinion and instruction the defendant excepted.

2d Exception.—The plaintiff then to support the issue on his part joined, offered in evidence the following patent:

"THE STATE OF MARYLAND, to all persons to whom these presents shall come, greeting: Know ye, that whereas,

T. W. VEAZEY, John Hoyer, of Allegany County, on the 28th day of September, 1837, obtained out of the Western Shore Land Office, a special warrant of escheat, to re-survey and affect the following lots, lying

T. BLAND, Ch. in the county aforesaid, and contiguous to each

other, viz: Nos. 1226, 1232, 1235, 1234, 1229, 1230, 1231, 1517, 2569, 2567, 2536, 2535, 2538, 2526, and 2527, with liberty of correcting errors, adding any contiguous vacancy, and of reducing the whole into one entire tract, and he, the said John Hoyer, assigned the said warrant of escheat to James Smith, of the county aforesaid. In pursuance whereof, a re-survey was made on only the following lots, viz: Nos. 1226, 1232, 1235, 1229, 1230 and 1231, and a certificate thereof returned, when the same were found to contain with fifty-five and a half acres of vacant land, added to the quantity of three hundred and fifty-four and a half acres, and called "Flavia," and he having since by his assignment, bearing date the 28th day of February, 1838, assigned, transferred and made over the same unto John Hoyer, who fully * compounded for said land according to law. The State of Maryland doth therefore, hereby **192** grant unto him, the said John Hoyer, the said lots re-surveyed as aforesaid, with the vacancy added, reduced into one entire tract and called "Flavia," lying in Allegany county aforesaid. Beginning for the outlines of the whole, at the end of the third line of lot No. 1225, it being also at the end of the second line of lot No. 1223, and running thence reversing the third line of lot No. 1225, and running with the second line of lot No. 1222, north seventy-eight degrees west, sixty-eight perches, to the second line of lot No. 2517, and reversing it and running with the second line of lot No. 2516, and reversing the second line of lot No. 1225, north twenty-six degrees east, one hundred and twenty-four perches, to the beginning of lot No. 1232, and reversing the given line thereof, south eighty degrees west, twenty-three perches, then reversing the third line of lot No. 1232, and running with the second line of lot No. 2518, and the second line of lot 2515, north twenty-six degrees east, one hundred and twenty perches, then reversing part of the second line of lot No. 1232, north sixty-six degrees east, one hundred and forty-three perches, then north twenty-three degrees east, ninety-three perches, to the second line of lot No. 1235, and running with the lines thereof, north sixty-seven degrees west, ninety perches, north twenty-six degrees east, eighty-five perches, south sixty-seven degrees east, ninety-five perches, then running with the first line of each of lots No. 1235 and 1226, south twenty-three degrees west, one hundred and seventy perches, to the end of the second line of lot No. 1230, and reversing said line, and running with the second line of lot No. 1231, south forty-five degrees east, two hundred perches, then running with the third line and with the given line of lot No. 1231, south forty-five degrees west, eighty perches, north forty-five degrees west, one hundred perches, to the end of the first line of lot No. 1229, then by a straight line to the beginning, containing three hundred and fifty-four acres and one-half of an acre, according to the certificate of re-survey thereof taken and returned into the Western Shore

193 * Land Office, bearing date the 5th day of January, 1838, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said John Hoyer, his heirs and assigns forever. Given under the great seal of the State of Maryland, this 7th day of September, 1838. Witness the Honorable THEODORICK BLAND, Esquire, Chancellor."

And then rested his case, relying upon the same as legally sufficient, in connexion with the testimony offered in the first bill of exceptions, which is to be taken and considered as forming a part of this second bill of exceptions, to vest the legal title of the land, for which this suit is brought, in him, and to entitle him to recover the same in this suit, to the sufficiency of which said patent for the said purpose, the defendant objected, and prayed the Court to instruct the jury, that the said patent was insufficient for the purpose for which it was so offered, on the ground, that it does not appear on the face of the patent whose lands were escheated, or any of the facts or circumstances, set forth to shew, that said lands so granted, were liable to escheat; which instruction the Court [BUCHANAN, C. J. and BUCHANAN, A. J.] refused to give, being of opinion, that the said patent so offered, was legally sufficient to vest the plaintiff, with title in fee in the lands it purports to convey, and that therefore, the plaintiff is entitled to recover; to which refusal and opinion of the Court, the defendant excepted.

3d Exception.—The defendant then to support the issue on his part joined, offered in evidence the following patents:

"THE STATE OF MARYLAND, to all persons to whom these presents shall come, greeting: Know ye, that whereas,

BEN. OGLE. General John Swan of the City of Baltimore, on the 17th of October, 1798, obtained out of the A. C. HANSON, Ch. Western Shore Land Office, a special warrant to re-survey the following lands, lying in Allegany County, and contiguous to each other, viz: Rich Glades, originally,

194 on the *9th of March, 1798, granted him for one hundred and fifty acres, and lots No. 1233 and 1236, each containing fifty acres, with liberty of correcting errors, adding vacancy, and reducing the whole into one entire tract. In pursuance whereof, a re-survey was made, when the same were found to contain the exact quantity of two hundred and fifty acres, and there being no vacant land added. The State of Maryland doth therefore hereby grant and confirm unto him, the said General John Swan, the said lands re-surveyed as aforesaid, reduced into one entire tract, and called Good Meadows, lying in Allegany County aforesaid, beginning at a bounded white oak, numbered 2511, standing at the end of six hundred and twenty perches, on the first line of a tract of land called the Royal Charlotte, it being the beginning of lot No. 2511, and running with the given line of said lot reversed, south eighty degrees east, one

hundred and eighty-five perches, to the end of the third line of said lot, then north twenty-six degrees east, seventy perches, to the end of the second line of lot No. 1235, and with it reversed, south sixty-seven degrees east, one hundred perches, to a pile of stones at the end of thirty-four perches on the third line of lot No. 1517, and with it reversed, south twenty-three degrees west, eighty-two perches, south fifty-nine degrees east, eleven perches, to a bounded red oak bush, south sixty-two degrees west, one hundred and fifty-six perches, to the end of the second line of lot No. 2515, and with it, north eighty degrees west, two hundred and eight perches, to a bounded black oak and white oak, the beginning of lot No. 2509, then by a straight line to the beginning, containing two hundred and fifty acres, according to the certificate of re-survey thereof taken and returned to the land office, bearing date the 27th of May, 1799, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said General John Swan, his heirs and assigns forever. Given under the great seal of the State of Maryland, this 30th day of December, 1800. Witness the Honorable ALEXANDER CONTEE HANSON, Esquire, Chancellor."

* "THE STATE OF MARYLAND, *To all persons to whom these presents shall come greeting:* Know ye, **195**

BEN. OGLE. that whereas, General John Swan, of the City of Baltimore, on the 7th of November, 1799,

A. C. HANSON, Ch. obtained out of the Western Shore Land Office, a special warrant of proclamation of resurvey, and to affect lots No. 1227, 1828 and 1224, lying to the westward of Fort Cumberland, in Allegany County, and contiguous to each other, which lots were originally allotted to Solethiel Gaff, a settler on and entitled to a preference in the purchase of the same, who neglected paying the purchase money for the same, within the time limited by law. In pursuance whereof, a resurvey was made, when they were found to contain the quantity of one hundred and fifty acres, for which the said John Swan, paid to the Treasurer of the Western Shore, the sum of thirty-three pounds fifteen shillings, being the full caution money due according to law. The State of Maryland doth therefore hereby grant unto him, the said General John Swan, the said lots resurveyed as aforesaid, reduced into one entire tract, and called Gaff's Neglect, lying in Allegany County aforesaid, beginning at a bounded white oak marked 2526; standing at the end of six hundred and forty perches on the north-east line from the bounded forked white oak, and running thence, south forty-five degrees west, two hundred and twenty-four perches, to the end of the second line of lot 1223, north forty-five degrees west, one hundred perches, north forty-five degrees east, two hundred and forty perches, to the beginning of lot No. 1231, and with the given line reversed, south forty-five degrees east, one hundred perches,

then by a straight line to the beginning, containing one hundred and fifty acres, according to the certificate of resurvey thereof, taken and returned into the land office, bearing date the 28th of January, 1800, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same unto him, the said General John Swan, his heirs and assigns forever.

Given under the great seal of the State of Maryland, * this **196** 16th day of April, 1801. Witness the Honorable ALEXANDER CONTEE HANSON, Esquire, Chancellor."

"THE STATE OF MARYLAND, *To all persons to whom these presents shall come greeting:* Know ye, that whereas,

ROB. BOWIE. General John Swan, of the City of Baltimore, on the 3rd of March, 1803, obtained out of the

A. C. HANSON, Ch. Western Shore Land Office, a special warrant, to resurvey the following lands lying in Allegany County, and contiguous to each other, viz: Good Meadows, originally on the 13th of December, 1800, granted him for two hundred and fifty acres, Gaff's Neglect, originally on 16th of April, 1801, granted him for one hundred and fifty acres, and lots No. 1225, 1226, 1229, 1230, 1231, 1232, 1234 and 1235, each containing fifty acres, with liberty of correcting errors, adding contiguous vacancy, and reducing the whole into one entire tract. In pursuance whereof, a resurvey was made, when the same were found to contain eight hundred and thirteen acres and one-quarter of an acre, and there being no vacant land added. The State of Maryland doth therefore hereby grant and confirm unto him, the said General John Swan, the said lands resurveyed as aforesaid, reduced into one entire tract, and called South Bar, lying in Allegany County aforesaid, beginning at a bounded white oak, numbered 2511, standing at the end of six hundred and twenty perches, on the first line of a tract of land called the Royal Charlotte, it being the beginning tree of Good Meadows, one of the originals of this resurvey, also the beginning of lot No. 2513, and running thence with the given line of said lot reversed, south eighty degrees east, one hundred and eighty-five perches, then with the third line of lots No. 2513, 2514, 2519 and 4150 reversed, north twenty-six degrees east, two hundred and forty-three perches, to the beginning of the sixth line of lot No. 2572, and with it south sixty-seven degrees east, ninety-three perches, to a bounded white oak marked 2532, it being the beginning tree of lot No. 1234, one of the originals, and the end of the third line of lot

197 No. 1514, then with the said third line and the third lines of * lots No. 1516, 1517 and 1521 reversed, south twenty-three degrees west, two hundred and fifty-five perches south, fifty-nine degrees east, eleven perches, to the end of the first line of lot No. 1520, and with it reversed, south forty-five degrees east, two hundred perches, to a tract of land called Chance, then with Chance, south forty-five degrees west, three hundred and twenty perches, to the begin-

ning of the second line of No. 1223, and with it, north forty-five degrees west, one hundred perches, to the beginning of the second line of lot No. 1222, and with it, north seventy-eight degrees west, sixty-eight perches, to the second line of lot No. 2517, then with said line reversed, and with the second line of No. 2516, north twenty-six degrees east, one hundred and twenty-two perches, north forty-five degrees west, three perches, south eighty-eight degrees west, twenty-six perches, to lots No. 2508, then with it, and lot No. 2515, north twenty-six degrees east, one hundred and twelve perches, to the end of the second line of said lot, still with it and lot No. 2509, north eighty degrees west, two hundred perches, to the first line of the Royal Charlotte, and thence by a straight line to the beginning, containing and laid out for eight hundred and thirteen acres and one-quarter of an acre, according to the certificate of resurvey thereof, taken and returned into the land office, bearing date the 10th of May, 1803, and there remaining, together with all rights, profits, benefits and privileges thereunto belonging. To have and to hold the same, unto him the said General John Swan, his heirs and assigns forever. Given under the great seal of the State of Maryland, this 2nd day of March, 1805. Witness the Honorable ALEXANDER CONTEE HANSON, Esquire, Chancellor."

Also the plats and explanations which accompany this bill of exceptions, and which are to form a part thereof. He also proved by George W. Devicmon, that from thirty-two to thirty-four years ago, he resided in the immediate neighborhood of the lands claimed by the plaintiff in this suit, and continued to live there during a period of twenty years, and that during all that time he never heard of John Kid, Timothy Langrel, John King, William King, George Elms, Samuel Denny and James Driver, * or either of them, being in that part of the country, or making any claim what-
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 ever to said lands. The defendant further proved by William Ashby, a competent witness, that he was born in the neighborhood of said lands, and is now fifty-six years old, that he, during all that time, never heard of the existence of the above named persons, or any of them, and never heard of them being in the neighborhood of said lands, or enquiring after or making claim to the same, up to this time. The defendant also proved by John Waltz, a competent witness, that he moved to the immediate neighborhood of the land claimed by the defendant in this action, and adjoining the same as far back as the year 1797, and has continued to live there ever since, and up to this time; that he saw the several lots of land contained in the tract of land called South Bar, run out in the year 1798, and that the said land has been claimed by said Swan, and those claiming under him, down from 1803, to the present time; that the possession or improvement numbered No. 1 on the plats, was made by George R. Waltz, about seventeen years ago, and the possession or improvement No. 2, as shown on the plats, was made about ten or twelve years ago,

and that the same were made under the defendant, and as his acts; and further, that during the whole time from the year 1803, down to the present time, he never heard of any person claiming said lots of land, or any of them, except the said General John Swan, and the defendant, and that at the time of the institution of this suit, and for several years before, Dudley Lee the defendant, was in possession of said lots as the tenant of James Swan. It was admitted by the plaintiff, that the land in controversy has been demised to the defendant and his heirs, by the last will and testament of the said General John Swan, deceased, his father, made on the 27th of May, 1820.

Whereupon the defendant by his counsel, prayed the Court to instruct the jury, that they might presume the death of the respective parties hereinbefore named, as the holders and owners of said lots, without heirs at the time the said lots of land were granted to the said John Swan, by the State of Maryland as aforesaid, and that the State of Maryland therefore, *at the time the patent **199** was issued to the said General John Swan, for the said lots of land, or a part of the tract of land called South Bar, had a right to grant the same, they then being liable to escheat, and that the title in fee of said lots, did pass by the said patent for South Bar, from the State of Maryland to the said General John Swan, and that therefore the plaintiff is not entitled to recover in this case upon the title so adduced, and relied upon by him as aforesaid; which prayer and instructions the Court [BUCHANAN, C. J. and BUCHANAN, A. J.,] refused, being of opinion, that the said patent for South Bar, passed no title whatever to the said John Swan, for said lots so embraced in the same. To which refusal and opinion, the defendant excepted.

4th Exception.—The defendant then further to support the issue on his part joined, in addition to the evidence offered in the third bill of exceptions, which is to be taken and considered as forming a part of this fourth bill of exceptions, proved by competent testimony, that General John Swan was taxed with the said tract of land called South Bar, including said lots, from the year 1805, to the time of his death, and paid the tax on the same, and that since his death down to the present time, the said land in controversy has been taxed to the defendant, who had paid the taxes on the same.

Whereupon the defendant by his counsel, prayed the Court to instruct the jury, that they may and ought to presume, that deeds of conveyance were duly made, executed and acknowledged, conveying to the said John Swan, in his life-time in fee, the said lots of land so owned by the soldiers, the respective said original owners thereof, which instruction the Court refused to give; to which opinion and refusal of the Court, the defendant excepted.

The verdict and judgment being against the defendant, he prosecuted the present appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

Alexander and Schley, for the appellants. *Price*, for the appellee.

* STEPHEN, J. delivered the opinion of this Court. During the trial of this case, several exceptions were taken to the 200 opinions of the Court below, upon which it becomes the duty of this Court now to decide. The plaintiff to support the issue on his part joined, offered in evidence certain certificates and extracts from the books of the land office, for the purpose of shewing title, in the respective persons named in said papers, to the respective lots of land, to recover which this action was instituted, at the time said papers and entries were made; to the sufficiency of which extracts from the books of the land office for such purpose, the defendant objected, on the ground that said extracts did not furnish sufficient evidence to prove that said lots of land had been allotted to the respective persons therein named by the commissioners, so as to vest the legal title to said lots in said persons respectively; but the Court was of opinion and so instructed the jury, that the said extracts were legally sufficient for the purpose for which they were offered; to which opinion and instruction the defendant excepted; and whether in that opinion there was error, it is now necessary to determine.

By the Act of 1788, chapter 44, it was made the duty of the commissioners to distribute the lots in controversy among certain officers and soldiers by lot, and to endorse the name of the officer or soldier on the ticket, containing the number drawn by such officer or soldier; and that the law provides that thereupon, an estate in fee simple should be vested in the officer or soldier in such lot, without any patent, deed or grant, to be issued for that purpose; a legal estate in fee therefore vested in the officers and soldiers by operation of law, without any further evidence or muniment of title to be furnished by the officers of government for that purpose. The law directing the distribution, also provides that the commissioners shall make a record of all the lots by them distributed among the said officers and soldiers, and return the same to the Register of the Land Office, to be by him safely kept. The said law also recognizes the validity of the books, in which are entered the certificates of all the lots distributed as * aforesaid, ascertaining and defining their 201 respective boundaries and locations. From these books and the record returned into the land office by the commissioners, the certificates and extracts offered in evidence were taken and certified by the Register of the Land Office, and we are of opinion that they were good and sufficient evidence for the purpose for which they were offered. So far as the question of title was involved, they were by law invested with all the legal properties and attributes of a patent, and were therefore competent and admissible evidence; the certificates

of the register embracing every thing which the records of his office can furnish in relation to the title and ownership of such lots.

The plaintiff then in addition to the preceding evidence, offered in evidence an escheat patent for the land for which the ejectment was brought, and there rested his case, relying upon the same as legally sufficient, together with the evidence in the first bill of exceptions to vest the legal title of the land, for which the suit was brought, in him, and to entitle him to recover; but the defendant objected to the sufficiency of the patent for that purpose, on the ground that it did not appear on the face of the patent whose lands were escheated, nor were any of the facts or circumstances set forth to shew that said lands were liable to escheat; but the Court overruled the objection, and were of opinion that the patent was legally sufficient to vest the title in fee in the plaintiff in the lands it purported to convey, and that therefore the plaintiff was entitled to recover.

In this opinion of the Court there was no error, so far as the same was objected to by the defendant. In 2 *H. & J. Rep.* 126, the principle is stated to be, that an escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. It is not necessary or usual according to the practice of the land office, to state on the face of the patent whose lands were escheated, or the facts or circumstances which shew the lands were escheatable. Where a warrant regularly issued, has been executed by the proper officer, and a certificate returned, which has laid a sufficient
202 * time in the land office without caveat, to justify the emanation of a grant, it is but a fair, reasonable, *prima facie* presumption, that the land taken up was escheatable, and that the title passed to the grantee. But the Court erred in that part of their opinion, in which they declared that the plaintiff was entitled to recover all the land covered by the patent, as well that part which was escheated, as that which had been taken up as vacancy. It appears by the proof in the case offered by the plaintiff himself, that lot numbered 1225, had been allotted to a certain John Kidd, which was taken up and included in his patent, as vacancy.

We think there was no error in the opinion of the Court in the third bill of exceptions. The lots were distributed to the soldiers in 1789, in virtue of the Act of Assembly passed for that purpose, and South Bar was patented on the 2nd March, 1805, a period of time too short to warrant the presumption of the death of the holders of such lots, without heirs, under the circumstances of the case; there being no proof moreover that the soldiers ever resided on the lots, or in the neighborhood where they were situated, or any evidence offered of any facts or circumstances on which such a presumption could be properly found. But such a presumption at all events, ought not to be made in support of a title, acquired in violation of law and the rules of the land office, which require two-thirds of the value to be

paid to the State, before a title can be obtained in lands liable to escheat, and which also require that a warrant of resurvey should be founded upon a seizin in fee, in the lands upon which the resurvey is to be made; neither of which essential conditions appear to have been complied with in the case of the patent for South Bar.

We think there was no error in the opinion of the Court in the fourth bill of exceptions. The possession of the defendant of the lots in controversy was only a partial one, and that for so short a period as ten or fifteen years, with a general claim of title, was too short a period to warrant the presumption of a conveyance of the lots to the patentee of South Bar, as prayed for by the defendant. For the reasons above stated, * the judgment of the Court below is reversed and a procedendo ordered. **203**

Judgment reversed, and procedendo awarded.

GUSTAVUS BEALL vs. JAMES BLACK.—December, 1843.

Under the Act of 1835, ch. 201, the County Court has jurisdiction in an action on the case, for overflowing the plaintiff's land, by reason of obstructions suffered to remain in defendant's mill-race, where the damages laid were above one hundred dollars, though the verdict was for a less sum. (a)

In cases of contract the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction. The language is where the debt or damages do not exceed one hundred dollars. (b)

It is the duty of Courts of justice by a just construction, to reconcile the various sections in an Act of Assembly, to prevent that clashing interference and incongruity which ought never be imputed to the Legislature, where it is practicable to avoid it. (c)

APPEAL from Allegany County Court. This was an action upon the case, brought by the appellee against the appellant, on the 15th April, 1840.

The plaintiff declared, that whereas the said plaintiff on, &c., and long before was, and from thence hitherto hath been, and still is lawfully seized and possessed of a certain close, consisting of lots Nos. 218 and 219, situated on Mechanic street in the town of Cumberland, and a parcel of land being part of the tract called "Walnut Bottom," situated on Mill street in said town, through which said close a certain canal, commonly called a "mill race," for a long time hitherto hath existed and still exists, in and through which, until the committing of the grievances hereinafter mentioned, the water has been

(a) Cited in *Ott vs. Dill*, 7 Md. 255; *Abbott vs. Gatch*, 18 Md. 336.

(b) Approved in *Abbott vs. Gatch*, 18 Md. 336; *Bushey vs. Culler*, 26 Md. 552. See *O'Reilly vs. Murdoch*, ante, m. p. 32.

(c) See *Canal Co. vs. R. R. Co.* 4 G. & J. 7, note (n.)

used to run and flow in sufficient and abundant quantity, to supply a certain mill of the said defendant, situated below the close aforesaid, of the said plaintiff, without overflowing in any manner the banks of said canal, or doing the least injury to the close aforesaid, to wit, at the county aforesaid. And whereas, in consideration of the use and enjoyment of the said canal, * by the said defendant, for **204** the purpose of conveying by means of the same, the water out of Wills Creek, down and through the said plaintiff's close to the mill of the said defendant, for the use thereof, it was the legal and bounden duty of the said defendant, to have kept the said canal at all times hitherto, free from obstructions of any kind, and to have kept the bed of the same constantly cleaned out, and prevented it from filling up by any sort of wash or alluvial matter, &c., to wit, at the county aforesaid. Yet the said defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said plaintiff in respect of his said close, by making the same valueless and untenable heretofore, to wit, on the day and year first above mentioned, and on divers other days and times before and since obstructed the water in said canal, and caused the same to back up, until it reached and overflowed the said plaintiff's close, and covered the same with a constant pool of water, by raising and heightening the dam at his, the defendant's mill aforesaid, above its usual, lawful and customary height, and altering the bed of the same, and also by contracting the dimensions of said canal, at and near said dam, and suffering the wash and all sorts of alluvial matter to accumulate in the bed of said canal, along the whole line of the same, from its junction with Wills Creek unto the terminus thereof, at the said defendant's mill aforesaid, to wit, at the county aforesaid. By means whereof, the close aforesaid, of the said plaintiff was and has been, and still is greatly impaired in value, and ever since the committing of the grievances aforesaid, has become entirely useless, unfit for cultivation and uninhabitable, to wit, at, &c.

The declaration contained several other counts, varying the nature of the injury complained of, and concluded, whereby the said plaintiff saith that he hath damage, and is the worse to the value of one thousand dollars, and thereupon he brings suit, &c. The defendant pleaded not guilty, on which issue was found, and a verdict was rendered against him for seventy-five dollars.

205 * Motion in arrest of judgment. For that at the time of issuing the original writ in this cause, the Act of the General Assembly of Maryland of 1835, chapter 201, entitled an Act to establish magistrates' Courts in the several counties of this State, and to prescribe their jurisdiction, was in force in Allegany County, and the cause of action was therefore not within the jurisdiction of this Court, the verdict of the jury in this cause being for a sum less

than one hundred dollars, by the defendants deducting the amount of such damages found by the jury from his costs.

The County Court overruled the motion in arrest, and the defendant, after judgment against him, prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

McKaig, for the appellant. *McMahon* and *Price*, for the appellee.

STEPHEN, J. delivered the opinion of this Court. This is an action of trespass on the case, instituted in Allegany County Court, for an alleged injury to the plaintiff by overflowing his land, and the damages laid in the *narr.* to amount to the sum of one thousand dollars. The suit was brought after the passage of the Act of 1835, chapter 201, establishing magistrates' Courts in the several counties of this State, and prescribing the limits of their jurisdiction. The jury rendered a verdict for the sum of seventy-five dollars, as the amount of damage sustained by the plaintiff, and the defendant by his counsel moved in arrest of judgment, upon the ground of a defect of jurisdiction in the County Court, and that the cause of action was exclusively cognizable by the magistrates' Courts, as their jurisdiction was limited and defined by the provisions of the said Act of Assembly. The motion of the defendant was overruled by the Court below, and the jurisdiction of the County Court sustained by entering judgment for the plaintiff, upon the verdict for the damages found by the jury, and his costs of suit.

* A question of a similar nature has very recently engaged the attention of this Court, which rendered it necessary to **206** examine the several Acts of Assembly, defining the powers of justices of the peace in the recovery of small debts, and other matters submitted by law to their jurisdiction. According to the opinion then entertained by this Court, in reference to the proper test of jurisdiction to be applied to this case, the jurisdiction of the Court below was not ousted or taken away by the Act of 1835, ch. 201, and judgment in favor of the plaintiff for his damages and costs was properly entered by them.

The Act of 1835, ch. 201, sec. 2, provides that the district Courts "shall have jurisdiction over, and may take cognizance of all cases whatever, now within the jurisdiction or cognizance of a single or two justices of the peace, and in all like or similar cases, where the debt or damages laid or claimed, shall not exceed the sum of one hundred dollars, and under like and similar restrictions and limitations, except so far as the same may be inconsistent with the provisions of this Act; and shall have and exercise original jurisdiction in all cases of debt or contract, expressed or implied, where the debt or damages do not exceed one hundred dollars," and in all actions of

trespass, where the title is not involved, and the damages claimed do not exceed one hundred dollars.

Prior to the Act of 1835, the jurisdiction of the County Court to administer redress to the plaintiff for the injury done to his property was clear and unquestionable, and we do not think that upon a proper and true construction of that Act, according to the principles settled by this Court, in the case of *O'Reilly vs. Murdoch*, above referred to, it has been taken away or ousted.

In that case it was held, that in actions similar to the present, the true standard of jurisdiction was furnished not by the sum recovered by the verdict of the jury, but by the sum put in demand, or the damages laid or claimed in the plaintiff's declaration. By an Act passed in 1824, a new test of jurisdiction was first introduced in cases sounding in *tort*, and not in contract, and from that period, the same rule has been *preserved inviolate. The rule established by that Act, (and which has uniformly been adhered to ever since,) to test the jurisdiction of the justices of the peace in cases of *tort*, has been the damages claimed, and not the sum recovered. In cases of contract, a different principle seems to have prevailed; and in all such cases, the sum recovered, and not the matter put in demand is made to decide the question of jurisdiction. From this rule no departure has been made by the Act of 1835. In all cases of debt or contract, expressed or implied, it is the real debt or damage which founds the jurisdiction. The language is, shall have and exercise original jurisdiction, "where the debt or damages do not exceed one hundred dollars," but when that Act confers jurisdiction in trespass or other cases of *tort*, it is the sum demanded which furnishes the criterion of judicial power, and not the sum recovered. Nor is there anything in the fourth section of the said Act, which upon a proper construction of it, can be considered as impugning the views heretofore taken of this subject. The cases referred to in that section, where the jurisdiction of the County Court is made to depend upon the verdict of the jury, are manifestly cases of debt or contract, previously provided for in that Act, and where the same test had been adopted, and not cases of *tort*, where a different rule had been applied, as establishing the boundaries of jurisdiction. This construction is necessary to reconcile the second and fourth sections, and to prevent that clashing interference and incongruity, which ought never to be imputed to the Legislature, where it is practicable to avoid it.

Judgment affirmed.

*FIELDER BOWIE vs. RICHARD JONES, use of EDWARD 208
M. LINTHICUM.—December, 1843.

A release under the insolvent laws pleaded and relied upon as a defence in bar of the action, and upon an issue joined on a denial of the truth of the plea, when offered in evidence, is said to come incidentally in question.

The jurisdiction of the County Courts in relation to insolvent debtors is limited, but in support of a release under the Acts relating to them, all that is necessary to be shown, is that the case made by the record of the release is within the limited jurisdiction, and then the judgment would be just as obligatory and conclusive as if the judgment were one of a Court of general jurisdiction. (a)

The release of an insolvent debtor is an exception to the principle, that where the course of procedure is pointed out by statute, the proceedings must show their conformity with the Act by which they are authorized.

Under the Act of 1805, ch. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the Act of 1830, ch. 130, the jurisdiction of the County Court attaches by the presentation of a petition such as is prescribed by the Acts in relation to insolvent debtors. (b)

A single Judge is empowered to act upon the petition of an insolvent debtor, in the recess of the County Court, and hence the application for relief made in conformity to the statutes is depending in point of law, from the time of its presentation to the Judge, though not filed with the clerk of the Court.

Either the County Court, or a Judge thereof in the recess of the Court, may grant a personal discharge, appoint a trustee, and take a bond.

Where the release of an insolvent debtor comes incidentally in question, it cannot be avoided upon the ground, that the insolvent had a prior application depending at the time of the one under which he obtained his final discharge.

Where the jurisdiction of a Court once attaches, and the Court proceeds to final judgment, the same judgment, coming incidentally in question, is to be respected. (c)

Where the County Court maintained the invalidity of an insolvent debtor's release relied upon in bar of the plaintiff's action, and the jury found accordingly, and also, that the insolvent since his release had obtained goods, &c. by descent, &c. in his own right; this Court disagreeing with the County Court and holding the release valid, will award a *procedendo* to try the question of subsequent acquisition by the debtor within the exceptions of the Act of 1805, ch. 110.

APPEAL from Prince George's County Court. This was a *scire facias*, sued out on the 28th August, 1835, to revive a judgment of

(a) Cited in *Purviance vs. Glenn*, 8 Md. 207; *State vs. Reaney*, 13 Md. 240. See note (c) *infra*.

(b) Cited in *Trail vs. Snouffer*, 6 Md. 318.

(c) Approved in *Tabler vs. Castle*, 22 Md. 102; *Keighler vs. Nicholson*, 4 Md. Ch. 94. See *Raborg vs. Hammond*, 2 H. & G. 38, note (b.)

trespass, where the title is not involved, and the damages claimed do not exceed one hundred dollars.

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A single Judge is empowered to act upon the petition of an insolvent debtor, in the recess of the County Court, and hence the application for relief made in conformity to the statutes is depending in point of law, from the time of its presentation to the Judge, though not filed with the clerk of the Court.

Either the County Court, or a Judge thereof in the recess of the Court, may grant a personal discharge, appoint a trustee, and take a bond.

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The insolvent's deed to his trustee was dated 13th April, 1831, and acknowledged on the same day before the Judge who granted the discharge.

Prince George's County, *Sct*: I do hereby certify that I am in possession of all the property, real, personal and mixed, of Fielder Bowie, mentioned in his schedule, accompanying his application for the benefit of the insolvent laws of this State. PHIL. CHEW.

Whereupon the Court passed the following order:

Mr. Beall,—File this petition and papers, enter the personal discharge of the petitioner, and the usual order of publication of notice to the creditors. J. R. PLATER.

April 13th, 1831.

212 * And it was also ordered by the said Court, that the said Fielder Bowie make publication of the following order which is as follows:

Prince George's County Court, April Term, 1831. Ordered by the Court, that the creditors of Fielder Bowie, a petitioner for the benefit of the insolvent laws of this State, be and appear before the Court at Upper Marlborough Town, on the second Mouday of October next, to file allegations (if any they have,) against said petitioner, provided a copy of this order be published once a week for three successive months, before the said second Monday of October. Test, AQUILA BEALL, Clk. P. G. C. C.

On which said second Monday of October, being the tenth day of the same month, in the year of our Lord eighteen hundred and thirty-one, the said Fielder Bowie, in pursuance of the condition of this bond aforesaid, executed to the State of Maryland for that purpose, and according to the requisitions of the order of publication aforesaid, of the said Court, appears in Court here, and the said Fielder Bowie, the petitioner aforesaid, appears also in Court here, on the twelfth day of the same month, in the year aforesaid, and files the following certificate of the editor of the Maryland Republican newspaper, of the publication of the foregoing order of the said Court, with a copy of said order thereto annexed, which said certificate is in the following words, to wit:

I hereby certify that the order of Prince George's County Court, in the case of Fielder Bowie, hereto attached, has been inserted in the Maryland Republican once a week for three successive months, from the 2d July, 1831. JERH. HUGHES.

Which being read and heard, and due consideration had, it was thereupon ordered and adjudged, that the final oath be administered to the said Fielder Bowie, and that he the said Fielder Bowie shall be discharged from all debts, covenants, contracts, promises and agreements, due from or owing or contracted by him, provided nevertheless, that any property which he hath acquired since the **213** passage of the said Act, or which * he shall hereafter acquire

by gift or descent, or in his own right by bequest, devise, or in course of distribution, shall be liable to the payment of the said debts.

Test,

JNO. B. BROOKE, Clk.

The plaintiff then, under the agreement in reference to the pleadings, to support the issue on his part joined, proved to the jury that the original judgment, to revive which the present *scire facias* is brought, was rendered against the defendant at April Term, 1826, of Prince George's County Court, and gave evidence of its amount to the jury.

The plaintiff also offered in evidence to the jury the following record of the defendant's petition for the benefit of the insolvent laws, filed on the 17th day of October, 1827, and all the proceedings thereon, which are as follows, &c. This last application was prosecuted until April Court, 1831, when the said Fielder Bowie, the petitioner aforesaid, by his attorney aforesaid, moves the Court here that his petition aforesaid, with all things thereunto relating, be dismissed and set aside, and that the said Fielder Bowie have no discharge under or benefit of the insolvent laws of the State of Maryland, in virtue thereof. Whereupon it is ordered, adjudged and determined that the petition aforesaid, of the said Fielder Bowie, with all things thereunto relating, be and the same are hereby dismissed, set aside and held as utterly null and void, and that the said Fielder Bowie receive no discharge under or benefit of the several insolvent laws of the State of Maryland, in virtue thereof.

Test,

JOHN B. BROOKE, Clk.

The plaintiff insisted before the Court that the final discharge of said Fielder Bowie, under the said petition of the 15th of April, 1831, was irregular and void, and was no bar to the execution sought for in the present action, but the defendant by his counsel contended that it was not competent for the plaintiff to take advantage of said objection, as to the irregularity of said discharge in the present action, and prayed the Court so to instruct the jury. But the Court [STEPHEN, C. J.,] were of opinion, that it was competent for the plaintiff to make said objections, and instructed the jury, that if they find that the *said defendant obtained his personal discharge, that the trustee was appointed and gave bond, and the insolvent 214 executed his deed to the trustee before the petition was filed, that then the said final discharge was irregular and void, and was no bar to the plaintiff's right in the present action; to which opinion of the Court and their instruction to the jury, the defendant excepted.

The jury found by their verdict that the defendant did not obtain his final discharge, &c., and that he had acquired goods, &c., since the rendition of the judgment, by descent, &c., in his own right, upon which the County Court ordered a *fiat executio*.

The cause was argued before ARCHER, DORSEY, and CHAMBERS, JJ.

Thomas F. Bowie and J. Johnson, for the appellant.
T. G. Pratt, for the appellee.

ARCHER, J. delivered the opinion of this Court. The Court below decided that it was competent for the plaintiff to object to irregularities in the defendant's discharge under the insolvent laws, and they instructed the jury, that if they find that the defendant obtained his personal discharge, that the trustee was appointed and gave bond, and the insolvent executed his deed to the trustee before the petition was filed, that then the said final discharge was irregular and void, and was no bar to the plaintiff's right in the present action.

It is said by this Court in 2 *G. & J.* 50, that the decision of a Court of competent jurisdiction, when coming incidentally in question, or offered in evidence of title in any other Court, is conclusive of the question decided, and cannot be impeached on the ground of informality in the proceedings, or error, or mistake of the Court in the matter on which they have adjudicated, and the Court in that case decided that the County Court would not determine letters of administration to be void, although granted by the Orphans' Court in a case where the law had conferred no authority on such Court to grant letters.

It is supposed that the judgment of the County Court does not come incidentally in question here. But in answer to this
215 * we have to say that it is pleaded and relied upon only as a protection against the claim of the plaintiffs. The case of *Taylor and McNeil vs. Phelps*, 1 *G. & J.* 503, will be found to be an answer to the objection. The only inquiry would therefore seem to be whether the jurisdiction of the County Court attached; if it did, whatever irregularities may have been committed, could not be the subject of revision.

It is however supposed that the Court in the exercise of its jurisdiction in relation to insolvents, is limited, and that the course of procedure is pointed out by the statutes, that therefore all the requirements of the various acts as preliminary to the final discharge, must appear to have been substantially complied with. It is true the jurisdiction of the Court is limited, but in such case all that is necessary to be shewn is, that the case is within the limited jurisdiction, and the judgment would be just as obligatory and conclusive as if the judgment were one of a Court of general jurisdiction.

However true may be the principle, that where the course of procedure is pointed out by the statute, the proceedings must show their conformity with the Act by which they are authorized; yet, since the decision of the Court in 5 *H. & J.* 189, the judgment of tribunals of this State, discharging insolvents, has been considered an exception to that rule. In the case adverted to the Court say, "they do not wish it to be understood that discharges under the

insolvent laws are liable to all the objections that are usually relied on against proceedings of persons limited by special authorities."

The same doctrine would appear to prevail in the English Courts. In *Willis' Rep.* 199, to an action on the case for goods sold and delivered, the defendant pleaded his discharge under the Act of 10 Geo. 2, by the General Quarter Sessions for the City of Bristol. To this plea there was a replication that the defendant had not surrendered himself to prison. The defendant demurred generally, and the Court say, that if it had appeared that the sessions had a jurisdiction, it would have been sufficient to have said generally, that the sessions had discharged him, and that the Court could not enquire into any facts *necessary to be done by him, in order to obtain his discharge, of which the sessions were the only and **216** the proper judges, and must be taken to have adjudged right, and they decide the plea to be defective, because it did not state what was necessary to give the Court jurisdiction, to wit, that the defendant surrendered himself to prison. See also the case of *Linwood vs. Hopkins*, referred to by the counsel in the above case, where it being objected that the proper notice was not given in the Gazette. Lord Hardwick was of opinion that the sessions were the proper judges of this, and that it could not be enquired into upon the trial. Under the Act of 1805, ch. 110, the presentation of a petition by a party in confinement, was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the Act of 1830, ch. 130, the jurisdiction of the County Court attaches, by the presentation of a petition, such as is prescribed by the Acts in relation to insolvent debtors. This view of the subject renders the examination of the various objections which have been urged against the regularity of the proceedings in this case, unnecessary.

Two objections however have been taken by the counsel for the appellee, one of which has been sustained by the Court below, which it may be proper for this Court to advert to, as they refer rather to the time and circumstances of the application, than to the proceedings themselves.

1. It is alleged that the proceedings are void, if the defendant obtained his personal discharge; the trustee was appointed and gave bond, and the insolvent executed his deed to the trustee before the petition was filed, and so the Court decided below.

The proceedings all bear date the 13th of April, and they are filed on the 15th of the same month. That the Court, or a Judge, possessed power to grant a personal discharge and to appoint a trustee and take a bond, is apparent from the Act of 1805, ch. 110, sec. 2 and 3; 1808, ch. 71, sec. 1 and 3, and 1827, ch. 71. The filing of the petition cannot be necessary to the validity of these Acts, because a Judge, in the recess of the Court, is expressly empowered to act when the petition is presented to him, conforming in its terms

217 to the Act of Assembly. * In such a case the law does not require, nor does it conform to practice in such cases to file the petition before the action of the Judge thereon. A case must be undoubtedly depending before the action of the Court or a Judge can be had, but such a case is depending, either before the Judge or the Court, when the petition is presented. We therefore think the Court erred in pronouncing the proceedings void, on such an hypothesis.

The next objection which has been alleged to the proceedings and judgment in this case is, that a prior application of the appellant was depending at the time of the application, upon which the discharge now in controversy was granted. This point was not raised in the Court below, or if it was, was not decided by the Court, but as it may again arise in the case, we think proper to say, that the principles heretofore adverted to in this opinion, are decisive of this question. The Court of Prince George's County have proceeded to the final discharge of the appellant, which we are bound to respect, having seen that the jurisdiction of the Court once attached by the presentation of the appellee's petition.

The jury have found, by their verdict, that property by descent, devise, bequest, &c., has come to the defendant, and it is proper, under these circumstances, that the case should be remanded.

Judgment reversed, and procedendo awarded.

218 * WILLIAM NELSON and ELIZABETH, his Wife *vs.* JOSHUA B. BOND, surviving partner of RICHARD BOND.—December, 1843.

An action against husband and wife, founded on the note of the wife, made by her while sole in Louisiana, is not barred by her release before marriage, and after the maturity of her note, under the insolvent laws of Maryland. (a)

The plea of limitations is classed among those not deemed meritorious, and in relation to the reception of which, Courts of justice act with care and strictness, and must be filed by the rule day. (b)

A general continuance of a cause does not enlarge the time to file the plea of limitations. (c)

Upon a note made in Louisiana, bearing ten per cent. interest until paid, this Court will enter judgment accordingly.

APPEAL from Harford County Court. This was an action of assumpsit, brought on the 7th May, 1839, by the appellee against the

(a) See *Frey vs. Kirk*, 4 G. & J. 352.

(b) Approved in *Griffin vs. Moore*, 43 Md. 253. See *Lamott vs. McLaughlin*, 3 H. & McH. 197, 198, *note*.

(c) Approved in *Spear Griffin*, 23 Md. 431. But a day to plead must be assigned under rule of Court. *Ibid.*

appellant, to recover the amount of a promissory note of Elizabeth, the wife of the appellant, made while *sole*, on the 1st April, 1831, at Donaldson, in the State of Louisiana, payable twelve months after date, to Joshua B. Bond the appellee, and one Richard Bond, (since dead,) then partners in trade, &c., for the sum of \$136.63, bearing ten per cent. interest, for value received.

The parties, without further pleading, submitted the case to the County Court on the following statement of facts, viz:

In this case it is admitted that the promissory note, which is the ground of the action, is the note of Elizabeth, now the wife of William Nelson, who together, are the defendants in this suit: that the same was duly executed, as it purports, at Donaldson, in the State of Louisiana, on the day of its date, and that at the time of its date aforesaid, the plaintiffs and the said Elizabeth resided in the State of Louisiana; that after the execution of the said note, the said Elizabeth removed to the State of Maryland, and there, to wit, in Harford County, on the 14th December, 1837, applied for the benefit of the insolvent laws of said State of Maryland, and on the 17th March, 1838, obtained a final discharge under said application, and was a short time afterwards, before the institution of this suit, *married to the defendant William, and that said Elizabeth had no property when she applied for the benefit, and has not acquired any since. It is further admitted, that more than three years had elapsed from the time said note fell due till the institution of this suit, and that the defendants are to be considered as having all the benefit of a plea of limitations, pleaded by them at the May Term, 1841; and the plaintiff had moved the Court to strike out the same, on the ground of its coming in too late under the following rules of Harford County Court: 219

Eleventh Rule.—The 1st day of January and the 1st day of June shall be the rule days, and whenever a rule is laid to declare or to plead, the declaration or pleadings are to be filed on or before the rule day. When a declaration or any other part of the pleadings is filed on or before the rule day, in pursuance of a rule previously laid, the adverse party shall be bound to answer the same, and to file the pleadings necessarily arising in succession on or before the second day of the next succeeding term; either party failing to comply with this rule may have judgment of *non pros*, or by default entered against him whenever the action is called up on the first going over of the docket, but the general issue plea may be pleaded by a defendant at any time before judgment by default is entered against him, although he hath not pleaded before the rule day; this however will never be considered a reason to delay the "trial."

Sixty-eighth Rule.—Ordered, that all declarations, replications and other pleadings, shall be filed on or before the 1st day of May and the 1st day of November preceding each term of this Court, and all rules to plead or declare shall operate to the said days respectively, and

any party failing to comply with a rule to plead or declare, shall have judgment of *non pros* or by default, as the case may be, according to the rules of this Court.

And had also replied, that the defendant Elizabeth had admitted the said debt in her insolvent schedule to be due when she applied for the benefit of the insolvent laws as aforesaid; and secondly, that by the laws of Louisiana, where the note * was made, it **220** would not be barred until ten years had elapsed from its date. And it is admitted that the said debt was inserted in the schedule of debts due and owing by the said Elizabeth, made and filed with her application for the benefit of the insolvent laws as aforesaid, and that by the laws of Louisiana the said debt would not be and is not barred until the expiration of ten years from its date.

It is agreed that this case be submitted to the Court on the foregoing statement, and if the Court shall be of the opinion that the plaintiff is entitled to recover, their judgment to be entered for the plaintiff, with interest, and costs. It is also admitted that ten per cent. is the legal rate of interest on said note by the laws of Louisiana. And if the Court shall be of a contrary opinion, then judgment to be entered for defendants, with costs, either party to be at liberty to appeal.

WM. B. BOND, for Plff.

OTHO SCOTT, for Def'ts.

The County Court adjudged that the said Joshua B. Bond recover against the said William Nelson and Elizabeth his wife, the sum of \$136.63, with ten per cent. interest thereon from the 1st April, 1831, till paid, and costs.

The defendants appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Otho Scott, for the appellants. W. Schley, for the appellee.

SPENCE, J. delivered the opinion of this Court. The statement of facts in this case set forth that the action is instituted upon a promissory note executed by Elizabeth Stansbury to Joshua B. Bond and Richard Bond; that the note was made and executed in the State of Louisiana, and that at the time the parties were citizens of the said State; it is also admitted, that subsequently to the time of making the note, the defendant Elizabeth removed to the State of Maryland, and was discharged under the insolvent laws of Maryland, **221** and * intermarried with the defendant William Nelson. It is further admitted, that Richard Bond hath died, and Joshua B. Bond survived him.

The first reason presented to our consideration why this Court should reverse the judgment of the County Court, is, because the discharge of the wife while single under the insolvent laws of Maryland, is a bar to the recovery by the appellee in any of the Courts in

this State. We think this is not an open question in Maryland, since the decision in case of *Frey vs. Kirk*, 4 G. & J. 509, in which this precise point was made, and after a full investigation of the authorities on the subject, this Court decided the discharge was no bar to the action.

We are of the opinion, that under the statement of facts, the plea of limitations is out of the case. The plea is classed among those not deemed meritorious, and in relation to the reception of which, Courts of justice act with care and strictness.

The limitation of time within which this plea might have been filed under the rules of Harford County Court, expired on the 1st day of November, 1840; the agreement states that the plea of limitations is not to be considered as filed sooner than May Term, 1841.

It is insisted, that the rule to plead was extended at November Term, 1841, and thereby gave the defendant liberty to file this plea. This would be rather a strange effect, resulting from the plaintiff's courtesy to the defendant, if it conferred upon him a right which he had lost by his default, to wit, to plead any other plea than one to the merits. To adopt such a construction of the rules of Court, would be to change the long established practice in most of the judicial districts in Maryland, a change which might not tend to promote the ends of justice.

Judgment affirmed.

* JACOB LEOPARD vs. THE CHESAPEAKE AND OHIO CANAL COMPANY.—December, 1843. 222

Under the Act of 1825, ch. 117, Rev. Code. Art. 71, sec. 7, this Court is not permitted to affirm or reverse the judgment of the County Court upon any point, which is not shown by the record to have been there raised and decided. (a)

(a) Cited in *Tyson vs. Shuey*, 5 Md. 558; *Warner vs. Hardy*, 6 Md. 541. A prayer that "there is no evidence on which, under the pleadings in the cause, the jury can find for the plaintiff, and their verdict must be for the defendant," resting not upon an entire failure of evidence, but upon the assumption that the facts proved are not legally sufficient to support the issues, is too general. *Hatton vs. McClish*, 6 Md. 407. Where no evidence has been offered in support of a case, or where the testimony offered has been rejected, a general prayer that there is no evidence is proper. *Ibid.* But where the testimony offered is legally insufficient to establish the issues, or where there is no evidence of a material fact, the prayer must point out specifically the defect or omission in the proof. *Ibid.* A prayer, that upon the whole evidence it is competent for the jury to find for the defendant," is too general. *Warner vs. Hardy*. No objection can be made in the Court of Appeals to an instruction on the ground that it submitted a question of law to the jury, or that it assumed facts, unless it appear from the record that an objection for such defect was taken at the trial below. *Stansbury*

A prayer to instruct the jury upon the foregoing evidence, that "the plaintiff is not in, the face of his said deed, entitled to recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road," involves no question upon the pleadings in the cause—nor whether the facts proved sustain the allegations in the declaration: it concedes the sufficiency of the pleadings, and only seeks a decision on the isolated question of the legal effect of the deed referred to, and that thereby the testimony given in the cause showed no cause of action. (b)

The question raised by this prayer bears no resemblance to the inquiries the Court is called upon to make, where objection is raised to the admissibility of evidence offered generally, in a trial before a jury. In such case the attention of the Court is necessarily called to the pleadings, the admissibility of the evidence being entirely dependent on them. (c)

A demurrer is a direct attack on the pleadings themselves, whereon the Court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading.

vs. Fogle, 37 Md. 369. An objection to a prayer which was granted that there was no evidence of the facts therein stated, not having been made in the Court below, will not be entertained in the Court of Appeals. *R. R. Co. vs. Gantt*, 39 Md. 116. On appeal from an order of the Orphans' Court, exceptions to the admissibility of evidence, or to the competency of testimony, may be taken in the Court of Appeals, though not taken in the Court below. *Dennison vs. Dennison*, 35 Md. 361. See also, *Davis vs. Leab*, 2 G. & J. 186, note; *Penn vs. Flack*, 3 G. & J. 221; *R. R. Co. vs. Carter*, 59 Md. 311.

(b) Approved in *Stockton vs. Frey*, 4 Gill, 422; *State vs. Milburn*, 9 Gill, 102; *Dorsey vs. Dashiell*, 1 Md. 207; *Owings vs. Jones*, 9 Md. 116; *Richardson vs. Milburn*, 11 Md. 346; *Birney vs. Tel. Co.* 18 Md. 355; *Railway Co. vs. Wilkinson*, 30 Md. 229; *Strauss vs. Young*, 36 Md. 255; *Build. Ass. vs. Grant*, 41 Md. 569. See also *Brooke vs. Waring*, 7 Gill, 5. "Since the decision of the case of *Leopard vs. Canal Co.* followed by *Stockton vs. Frey*, and by a number of other cases, all recognizing the same rule, it must be considered as settled that where a prayer is asked or an instruction is granted to a jury upon the evidence or facts in a cause merely, without reference to the pleadings, the Appellate Court is precluded by the Act of 1825, from considering the state of the pleadings. But it has always been competent for a party by a prayer properly framed to call the attention of the Court to the pleadings, and to ask its judgment upon their sufficiency or legal effect: the rule being that every suitor must recover according to the *allegata* and *probata*." *Railway Co. vs. Wilkinson*. A prayer that if the jury find certain enumerated facts, "then the plaintiff is not entitled to recover," is not based on the pleadings, but on the proof, and in granting the instruction, the Court are to be considered as placing their opinion, not in the structure of the pleadings, but on the broad ground that if the jury find the facts as stated, the plaintiff cannot maintain his action. *State vs. Milburn*. The objection to a variance between the allegation of the *narr.* and the proof, should be made in the Court below by objecting to the evidence when offered, or by a prayer properly framed for that purpose: if not so made it will be heard in the Court of Appeals. *Strauss vs. Young*.

(c) Approved in *Marshall vs. Haney*, 9 Gill, 258; *Dorsey vs. Dashiell*, 1 Md. 208; *R. R. Co. vs. State*, 41 Md. 298.

Upon a motion in arrest of judgment the Court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause. (d)

Before the Court can grant an instruction that a plaintiff is not entitled to recover, it must assume the truth of all the testimony given to the jury tending to sustain his right to recover, and of all inferences of fact fairly deducible therefrom. (e)

The Chesapeake and Ohio Canal Company has no right in cutting its canal across public highways, utterly to destroy them, and it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal. (f)

A deed from a party seized of land, conveying to the C. & O. Canal Company "such portion and quantity of his land as may be covered, used or occupied by the said canal, or the necessary works thereof," and describing the premises conveyed, is not a contract to surrender the privilege of using public highways which passed through the granted premises.

In construing a deed made to a canal company for the purposes of its works, the Court will presume that the parties to it understood their relative rights, powers, and duties, in respect to the subject-matter of their contract.

* APPEAL from Washington County Court. This was an action of trespass upon the case, commenced on the 18th Feb. 223
ruary, 1841, by the appellant against the appellee.

The appellant declared; that whereas the plaintiff on, &c., at, &c., long before, was and from thence hitherto hath been, and still is the proprietor and possessed of a water mill for the grinding of rye, &c., of a saw mill for the sawing of boards, &c., which said mills, until the committing of the grievance by the defendant hereinafter mentioned, were of great value to the plaintiff, and yielded and produced him great annual gains and profits; but for the grievance hereafter mentioned, would still be producing and yielding him great annual gains and profits. And whereas the plaintiff during all the time aforesaid, of right ought to have had, and still of right ought to have the use of a certain road passing through and over a certain close of the plaintiff and unto the said mills, for the plaintiff and his servants and his customers to the said mills to go, return, pass and re-pass, to and from the said mills with horses, &c., at his and their free will and pleasure, when, and as often as they required, for the purpose of carrying grists and saw logs and other timber, and wheat and rye and corn, &c., and other custom to the said mills as aforesaid, to wit, at, &c. Yet the defendants well knowing the premises, whilst the plaintiff was of right entitled to the use of the said road as aforesaid,

(d) Cited in *Spencer vs. Trafford*, 42 Md. 21.

(e) Approved in *Jones vs. Jones*, 45 Md. 155. See *Cole vs. Hebb*, 7 G. & J. 15, note (e.)

(f) Approved in *Eyler vs. Com'rs*, 49 Md. 269; *Canal Co. vs. Com'rs*, 57 Md. 217.

to wit, on the day and year aforesaid, wrongfully and injuriously cut, dug and made, and caused to be cut, dug and made, a certain canal called the Chesapeake and Ohio Canal, of great width and depth, to wit, of the width of sixty feet and of the depth of ten feet, with high and huge embankments, to wit, of the height of ten feet and of the breadth of twenty feet at the base, in and along the whole length of the lands and premises of the said plaintiff, and in and across the said public road, and continued and kept the said canal so cut, excavated and made as aforesaid, from the day and year aforesaid, to the time of the issuing of the writ original in this cause, and the said public road during all that time hath been obstructed, shut up, closed up and rendered impassable for the said plaintiff and his servants, and for his * customers to his said mills, and during all

224 that time the plaintiff and his servants, and the customers having business at his said mills, have been unable to pass and re-pass, to go to and come from the said mills with their horses, carts, wagons and other vehicles, as they of right ought to have done, to wit, at the county aforesaid. By means of which said premises the plaintiff has been deprived of, and has lost during all the time aforesaid, the use, benefit and advantage of his said mills, and has lost and been deprived of all his gains, tolls and profits and custom, which without the said obstructing he would have derived from his said mills, to wit, at the county aforesaid.

And whereas also, heretofore, to wit, on the day and year aforesaid, at the county aforesaid, the plaintiff was and still is seized and possessed of a certain farm, which until the committing of the grievance hereinafter mentioned, was free from all overflowing and injury from being flooded with water, and until the committing of the grievance hereinafter mentioned, was sound, dry and firm land, and produced large quantities of grain, and of grass and hay, to wit, at the county aforesaid, yet the defendant knowing the premises, unlawfully cut, dug and placed a certain canal called the Chesapeake and Ohio Canal, along, through and by the said land of the plaintiff, and so negligently, imperfectly and improperly made and constructed the embankments and other works of the said canal, that the water of the said canal has percolated and passed through the said embankments of the said canal and overflowed, submersed, flooded and greatly injured the lands of the plaintiff adjacent to, and lying along the said canal, and the plaintiff from the day and year aforesaid, to the day of the impetration of the writ original in this cause, by reason of the said flooding and inundation, has lost all the use and profits and benefit of the said land, and has been unable to produce either grain or grass on the said land, or to apply the same to any useful or profitable account or purpose, to the damage of the plaintiff of five thousand dollars, and therefore he brings suit, &c.

The appellees pleaded: 1. Not guilty. 2. Not guilty within three years. On these pleas issues were joined.

* The plaintiff to support the issue on his part joined in this case, proved by competent testimony, that he was as far back 225 as the year 1820, and still is, seized and possessed in fee of a tract of land or farm, lying and being in the county aforesaid, on which there have been and still are a grist mill and saw mill; that ever since he has so owned said farm and mills, there has been a public county road leading through his said farm, and to and by his said mills, on which road numerous persons residing in the neighborhood and country around, and considerably distant in Pennsylvania, have travelled to and from his said mills for the purpose of having their grain ground and made into flour and meal; and also to have their timber sawed into plank and scantling, and that there was no convenient way for the customers of said mills, residing in Pennsylvania and Maryland, or for the plaintiff himself to have access to the same except on and along said public road; that before the cutting and making of the canal as hereinafter stated, and up to the time of bringing this suit, the plaintiff derived and received as profits from said mills large sums of money; and that the said mills were capable of producing or manufacturing twenty barrels of flour per day; and sawing from 800 to 1000 feet of plank per day, and would produce in that way clear profits for the plaintiff equal in value to the sum of \$1,000 per annum. The plaintiff further to support the issue on his part joined, proved by competent testimony, that the defendant made and constructed the Chesapeake and Ohio Canal through the said land or farm of the plaintiff and near his said mills, and in constructing the same, dug up, excavated and wholly destroyed so much of said public road as to cut off thereby all communication by said road, with said mills by the customers thereof, as also by the plaintiff himself; and that ever since the said canal has been so constructed, and the said public road so dug up, excavated and wholly destroyed by the defendant, the plaintiff's said mills have not been used by said plaintiff, and have become entirely useless and unproductive to him, and have stood idle, and the customers of the same have been deprived of the use of said road for the purpose of going to and * from them to have their grain ground and their timber sawed into plank and other lumber, as they were accus- 226 tomed to do before the said road was destroyed by the making of the said canal.

The defendant then to support the issue on his part joined, offered in evidence the following deed from the plaintiff and his wife to the defendant:

"This indenture, made this 24th July, 1835, between Jacob Leopard and Delia Leopard his wife, of, &c., of the one part, and 'the Chesapeake and Ohio Canal Company' of the other part: whereas the said canal is intended to pass through the lands of the said J. L., who have contracted and agreed to sell to the said company, such portion and quantity thereof as may be covered, used or occupied, by

the said canal, or the necessary works thereof, in perpetuity, for which purpose the said J. L., and D. L. his wife, are willing to execute these presents. Now, therefore, this indenture witnesseth, that the said J. L. and D. L., for and in consideration of the premises, and also in consideration of the sum of \$1,075, to them in hand paid by the president and directors of the said company, &c., have granted, &c., unto the said C. and O. C., and unto their successors in perpetuity, all the following described pieces or parcels of land, lying in Washington County aforesaid, beginning, &c., thence describing thirty courses, containing 19 acres, 2 roods and 35 perches. Together with all that other piece of land lying adjacent to that above described, and between it and the River Potomac. Beginning, &c., containing, &c., with all privileges, &c., appurtenant. To have and to hold the said lands and premises unto the said C. & O. C. C. and their successors in perpetuity, to the only proper use, benefit and behoof of the said C. and O. C. and their successors in perpetuity, and to and for no other intent, use or purpose."

It was admitted that the land on which said public road was and run, is a part of the land conveyed by said deed to the defendant, and that that part of said road that was destroyed by the said defendant ran over the same. It was further admitted that the land
227 so conveyed, is the very land upon which * the said canal has been constructed, and that the said canal has been constructed in all respects in accordance with the charter.

The defendant thereupon moved the Court to instruct the jury that upon the foregoing evidence, the plaintiff is not, in the face of his said deed, entitled to recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road; which instruction the Court accordingly gave. The plaintiff excepted.

The verdict and judgment being for the defendant, the plaintiff prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Price and *F. A. Schley*, for the appellants.

J. T. Mason and *Tidball*, for the appellees.

DORSEY, J. delivered the opinion of this Court. The bill of exceptions, on which the present appeal is founded, presented for decision in the Court below no question upon the pleadings in the cause. Whether the declaration states facts sufficient, if proved, to enable the appellant to maintain his action, or whether the facts proved sustain the allegations in the declaration, are questions which, in the case before us, under the Act of 1825, ch. 117, we are not called on to decide. We are not permitted to affirm or reverse the judgment of the County Court, upon any point which is not shown, by the

record, to have been there raised and decided. The matter brought up for review in this Court is the granting, by the Court below, of the appellee's prayer for an instruction to the jury, that upon the evidence given in the cause, "the plaintiff (the appellant,) is not, in the face of his said deed, entitled to recover for any damage done his mills, by reason of the construction of the canal across said public road, and the destruction of said public road." The prayer as made to the Court, for the purpose of obtaining its determination thereof, since the Act of 1825, concedes by implication the sufficiency of the pleadings in the cause; and so far from inviting the Court to the examination * thereof, or raising any question thereon for its decision, it in effect withdraws them from its considera- 228
tion, and invokes it to decide the isolated question whether such were not the legal effect and operation of the deed referred to, that, thereby the testimony given in the cause showed no cause of action in the appellant. The question raised by the prayer made to the Court below bears no resemblance to the inquiries which the Court are called on to make where an objection is raised to the admissibility of evidence offered, generally, in a trial before the jury. There the attention of the Court is necessarily called to the pleadings in the cause; the admissibility of the evidence being entirely dependent on them. The Court cannot judge of its pertinence or materiality but by their inspection. Nor is it like the case of a demurrer, which is a direct attack upon the pleadings themselves, wherein the Court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading. Nor does it resemble a motion in arrest of judgment, where the Court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause, upon which it wholly depends, and without which it has no operation, and is incapable of forming the basis of a final judgment in the cause.

The leading motive of the Legislature in passing the Act of 1825, was to remedy an evil which had been severely felt and was loudly complained of, that in this Court the judgments of the County Court were reversed upon points never raised or decided below, and which, had they been there raised, would at once, by amendment or otherwise, have been obviated and never been presented for the consideration of the appellate Court. Such is the nature of the objection now taken in this Court, and such would have been its fate if raised in the County Court. It is that the plaintiff below could not recover, because his cause of action has been defectively stated in his declaration, though fully established by proof. Whether this defect exist or not, we have deemed it unnecessary to inquire; * because 229
the defect, if true, is excluded from the consideration of this Court by the express words and legislative intent of the Act of 1825.

A different decision would, in a great degree, virtually operate as a repeal of the Act of 1825.

Before the County Court could grant the instruction prayed for, it must assume the truth of all the testimony given to the jury, tending to sustain the plaintiff's right to recover, and of all inferences of fact fairly deducible therefrom. And must also determine, that so far as the rights of the appellant are concerned, the appellee had authority, for ever, to destroy that part of the public highway crossed by the canal. Assuming the non-existence of this right, whatever may be the imperfections of the declaration in the cause, we are clearly of opinion, that the testimony before the jury, if believed by them, was abundantly sufficient to entitle the appellant to a verdict. See the cases of *Chichester vs. Lethbridge*, *Willes' Rep.* 71; *Rose and others vs. Miles*, 4 M. & S. 101; *Hughes vs. Heiser*, 1 Binney, 463; *Greasley vs. Codling and another*, 2 Bingham, 263; *Wilkes vs. Hungerford Market Company*, 2 Bingham's New Ca. 281; and *Stetson vs. Faxon*, 19 Pick. Rep. 147.

The authority of the Chesapeake and Ohio Canal Company to destroy this public highway, and to perpetuate its destruction, has in the argument been claimed to exist under two distinct grants: the one emanating from the sovereign power of the State, through which the canal passes; the other from the appellant himself. Under the first, the charter of the Chesapeake and Ohio Canal Company, it is, in effect, asserted in the argument, that it has the power conferred on it, of occupying as its site, and of destroying by crossing, and perpetuating the destruction of every public highway between the City of Washington and the Ohio River. Such a proposition we think is not warranted by any Act of legislation before us, and nothing but a grant of such a power in terms the most full and unequivocal, would induce this Court to believe that the Legislatures referred to, designed to confer it. Such terms are not to be found in the charter of the canal company, and we do not deem it necessary to use arguments or illustrations to show the non-existence of such a power.

230 * Assuming then that the Chesapeake and Ohio Canal Company has no right, in cutting its canal across public highways utterly to destroy them, and that it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal; has the appellant by the deed of conveyance he has executed to the company, precluded or estopped himself from claiming a right to use the highway thus illegally destroyed by the canal company? That a public prosecution for a nuisance might be sustained for this destruction of the highway, is we think quite clear, and that all persons, other than the appellant, who, by reason of this obstruction or destruction of the highway, have sustained any special or particular injury or damage, may maintain an action on the case against the canal company,

appears to us, a proposition equally manifest. Is there, in the deed referred to, any stipulation or covenant, or any thing from which it can be implied, that the appellant contracted to surrender or disrobe himself of this privilege of using the public highway? a privilege possessed by every other citizen of the State. If there be, we have not discovered it. In construing this deed we must presume, in the absence of all proof to the contrary, (if indeed we could look to such proof, were it before us,) that the parties to it understood their relative rights, powers and duties, in respect to the subject-matter of their contract. The parties then knowing that the canal company were bound to re construct and keep open the highway for the benefit of the public, could the appellant suppose, that in executing the deed before us, he surrendered for ever a highly valuable privilege, of which every other member of the community was left in the free and uninterrupted enjoyment. What motive could he have had in making, or the canal company in exacting, such a surrender? The record discloses nothing from which we can be induced to believe that it was the intention of the parties to the deed, that such a sacrifice should have been made. And if in construing the deed we could look to the proof in the record, we could not be induced to believe that the appellant knowingly assented to it. That an annual * income of one thousand dollars, pertaining to realty, and which might endure forever, would, for the gross sum of \$1,075, **231** be surrendered and forever abandoned, cannot in our opinion be predicated of the appellant, under the circumstances of this case. The doctrine of estoppel, so much relied on in the argument, we regard as wholly inapplicable to the case before us. The applicant claims no privilege; asserts no right inconsistent with his grant.

CHAMBERS, J. dissented, and delivered the following opinion:

I concur with the majority of the Court in the opinion that the Canal Company was under a legal obligation in a reasonable time to provide a safe and sufficient passage way for the public, in lieu of the public county road which their charter permitted them to dig up and convert into the site of their canal, and that the injury to the plaintiff was of a character, according to the plaintiff's testimony, to entitle him to recover in a proper form of action. Still, in my opinion, the instruction of the Court below was properly given, that the plaintiff could not recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road. According to my view, the words, "in the face of his said deed," in no degree affects the case. The deed certainly had the effect to confer a right on the company to open the canal, but the most that it seems to me can be made of the introduction of these terms, is to consider them as intended as a reason why the legal proposition asserted, was true. How far the reason, if it be intended as a reason, which influenced the counsel in

moving the instruction, was adopted by the Court, there is nothing in their language to disclose, but it is not with the reasons, real or imputed, that we have to deal. The proposition of law expressed by the Court is, that the plaintiff could not recover. Recover where, when, how? Was it intended that the facts deposed to, would not, in any future suit, in any Court, at any time, form a ground of action? I think not, but that on the contrary, the application must be to that particular action then on trial.

232 *If to the instruction as asked, had been supplied the words, "in this action," or, "in this form of action," it could not be denied, I presume, that the Court must have looked to the declaration to see whether it enabled the plaintiff to recover. Now I have not been able to comprehend the legal distinction between the different expressions in an instruction, "could not recover in this form of action," "could not recover in this action," or "could not recover." It is said the Act of 1825, ch. 117, shuts out all questions not shewn by the record to have been decided by the Court below. Admitted. But the very question at issue is, "was the point raised in the Court below." The true interpretation of that Act is the precise matter of debate.

Since the earliest days of judicial history it has been an axiom, that a plaintiff cannot bring a suit for one thing and recover a different thing. The familiar illustration is, you shall not sue for a horse and recover an ox. Did the Act of 1825 design to change this fundamental principle? I cannot think its letter or spirit justify us in saying so; yet with due deference, it appears to me such is the plain result of the doctrine which will condemn the opinion of the Court below. The principle now proposed to be adopted is, that you must look alone to the evidence, entirely disregarding the pleadings, and if the case made by the evidence entitles the plaintiff to recover, the Court will not be permitted to give such an instruction as the present.

Now if the action be for injury to a horse, and the proof be of injury to an ox, the plaintiff, looking only to the case made by the proof, is entitled to recover, because, according to the principle assumed, he has made out a case by proof for which he could maintain an action, if his pleadings had conformed to the character of his proof. The pleadings however, it is said, are to be totally disregarded, and in effect, the case is to be treated in all respects in this Court as if the pleadings were technically suited to the evidence.

It may well be said too, that there is a more general sense in which both may be included within the same descriptive terms.

233 *The horse and the ox as properly belong to the same family of "beasts," as the "public county road" and the "canal," or "bridge," do to the family of "highways."

If suit is brought for a particular species, it is not enough to prove title to another species of the same *genus*, else we should find no

stopping point short of the universal term of "property," or something similar, which should include everything to which title could be made. But where will be the end of this principle of interpretation in its practical difficulties? The case of ejectment or replevin will best illustrate it. The replevin is instituted for a horse; the proof is that defendant seized and carried away a horse, and also an ox, from the plaintiff's enclosures; the defendant proves title to the horse, but makes no defence in proof as to the ox.

The defendant in a motion reciting the evidence which proves his title to the horse, asks an instruction to the jury, that if they believe this evidence "the plaintiff cannot recover." The Court refuse the instruction, and according to the principle assumed, their decision must be affirmed in this Court. In such a case what judgment is to be entered? Plaintiff has no title to the article for which his replevin was instituted, but he has proved title to another article, for which, is he entitled to judgment? And may not the same doctrine, when carried out to its inevitable results, be applied to the case of an ejectment for land, in which a recovery may be had for a horse? It does not remove the difficulty to say that objection may be taken below to the admissibility of the testimony. If the testimony was not admitted, the case does not arise, and it is very true, if there is no case, there is no difficulty. But the matter in hand is how to dispose of the difficulty when the case does arise. I cannot agree that the Act of 1825 was designed to insulate a question to an extent subversive of the most fundamental rule in the history and nature of suits at law. On the contrary, it is my opinion, that an instruction like the present, "that the plaintiff cannot recover," not only authorizes, but imperatively demands from the Court, a reference to the character and nature of the plaintiff's claim, and that as the *plaintiff in this case claimed damages alone, for cutting and digging the canal in and across the public road, and thereby 234 destroying it, he cannot recover for the failure of the Canal Company to provide some other proper passage way for the "public county road," which they had the right to dig up and destroy, and consequently, that the Court below was not in error.

Judgment reversed, and procedendo awarded.

JOHN E. BERRY vs. HENRY A. PIERSON and Wife.—December, 1843.

After a sale of a tract of land, the vendor, in consideration of natural love and affection, under his hand and seal assigned the unpaid purchase money to one of his grand-daughters, and then devised the land to his four grand-daughters, including his grantee, "to be equally divided among them." Upon a bill filed by the grantee of the purchase money against the vendee, the executors of the vendor and her co-devisees, the

latter agreed to a division of the balance of the purchase money among themselves, and to unite in a conveyance upon its payment, but one of the executors excepted to the averments of the bill under the Act of 1832, ch. 302, on the ground that it did not charge him with the receipt of purchase money. *Held*, that the sufficiency of the bill upon the appeal of that executor as against him, was open to the consideration of this Court.

Where a bill is properly excepted to upon the ground of the insufficiency of its averments to charge a party proceeded against, whatever may be the proof, no decree can be pronounced against him. (a)

Proper and sufficient allegations in a bill are necessary to prevent surprise and consequent injustice.

One who is executor, and as legatee claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund, that full and complete justice may be administered to all the persons interested in its distribution.

Where a defendant consents to the ratification of an audit which charges him with a sum of money, this is sufficient evidence of its receipt by him.

Where a bill gives a defendant no intimation that any claim would be made against him, but the demand appears in the proof, he may by way of exception to the auditor's report, rely upon the Act of Limitations, and it is no objection that it was not taken in the answer.

The defence of limitations may be taken in equity as soon as by the proceedings, the party has notice that any claim was to be made against him.

A party who receives money as a *quasi* trustee, as for the use of those to
235 * whom it belonged, not as acting under a continuing or express trust; whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the Act of Limitations begins to run from the time of the receipt.

Where limitations are relied on in equity, and the Court therefore deem it fruitless to proceed with the cause, though the claim could in other respects be maintained by an amendment of the pleadings, it will not be remanded.

APPEAL from the Court of Chancery. On the 25th of February, 1835, the appellees filed their bill against John T. Berry, Deborah Waring, William Edmonds and Rebecca his wife, John E. Berry, Otho B. Beall and Priscilla Waring, alleging that on or about the 1st July, 1826, a certain Benjamin Berry, late of, &c., (who has since departed this life,) the grandfather of your oratrix, being seized in fee simple of a certain tract, parts of tracts or parcels of land, with the appurtenances, situate, lying and being in Prince George's County aforesaid, commonly called "Good Luck," containing, or supposed to contain 250 acres, more or less, and being desirous of selling the said land, and a certain John T. Berry, (one of the defendants hereinafter named,) being disposed to purchase the same, a contract was accordingly on the day and year aforesaid entered into,

(a) Cited in *Kunkel vs. Markall*, 26 Md. 409. See *West vs. Hall*, 3 H. & J. 180; *Chalmers vs. Chambers*, 6 H. & J. 29.

by and between the said B. B. and the said J. T. B. for the sale and purchase thereof. The said J. T. B. agreeing to pay, and the said B. B. agreeing to take for the said land and premises the price and sum of thirteen dollars per acre, so that the entire purchase money amounted to the sum of \$3,250, interest being payable thereon from the day and year aforesaid; and your orator and oratrix further shew unto your honor, that the said J. T. B. paid to the said B. B., at the time of making said contract of sale, the sum of fifteen dollars on account and in part of the said purchase money, for which amount the said B. B., as your orator and oratrix are informed, passed to the said J. T. B. his receipt in writing of that date: and the said J. T. B. was thereupon immediately let into the possession of the said lands and premises, and has always since continued to use, enjoy and occupy the same. And your orator and oratrix also state unto your honor, that some time after the making of the said contract of * sale, to wit, on the 15th October, 1827, the said B. B. executed a certain instrument of writing, his own **236** proper hand and seal being thereto signed and affixed, and thereby for and in consideration of the natural love and affection which he bore unto your oratrix, his grand-daughter, (then named Eleanor Waring,) gave, assigned and transferred unto her the purchase money aforesaid, as will more fully and at large appear by reference to a copy of the said instrument of writing, which is herewith filed, marked A, to which your honor is referred, and asked to consider as a part of this bill of complaint. And your orator and oratrix aver, that the said J. T. B. was duly notified of the execution of the said instrument of writing, purporting to be an assignment of the said purchase money to your oratrix, very soon after the same was executed, to wit, on or about the 1st November in the year 1827, aforesaid. And your orator and oratrix further represent unto your honor, that the said B. B. in his life-time was always ready and willing to perform his part of the said contract, and if the said J. T. B. had paid to your oratrix the purchase money aforesaid, with the interest thereon, would have conveyed to him in fee simple the land and premises aforesaid. But the said J. T. B. in the life-time of the said B. B., wholly failed to make any payment in addition to the one hereinbefore mentioned, either to the said B. B., or your oratrix as his assignee, so that the said B. B. departed this life without making him any conveyance or deed for the same; that the said B. B. a short time before his death, to wit, on the 8th December, 1827, made and executed in due form of law, his last will and testament in writing, and thereby devised the said land and premises aforesaid, to his four following grand-daughters, to wit, your oratrix and her three sisters, Deborah Waring, Rebecca Waring, now the wife of one William Edmonds, and Priscilla Waring, at present residing in Montgomery County in the State of Ohio aforesaid, as will appear by reference to an extract from the said will, herewith filed as Exhibit B, which

your orator and oratrix pray may be also taken and considered as a part of this bill of complaint, in consequence of which devise, your

237 orator and oratrix are * advised, that the legal title to the lands and premises in question on the death of the said B. B. passed to your oratrix and her said sisters as tenants in common, and she therefore prays that her said sisters and the said W. E., the husband of the said Rebecca, may be made defendants to this bill of complaint. Your orator and oratrix also state, that the said B. B. by his said will, appointed a certain John E. Berry and Otho B. Beall, two of the defendants hereinafter named, and Spencer Mitchell, executors thereof; and the said Spencer Mitchell having declined accepting the trust confided to him in part by the said will, letters testamentary were in due form of law granted thereon to the said John E. Berry and Otho B. Beall; and your orator and oratrix further represent unto your honor, that the said J. T. B. being as aforesaid, notified of the assignment which your oratrix held of the purchase money aforesaid, afterwards made her the following payments on account thereof, to wit, on the 24th October, 1828, the sum of \$131.98, and on the 30th July, 1832, the sum of \$56.56; and your orator and oratrix therefore well hoped that the said J. T. B. would have paid to them the balance of the said purchase money, the whole thereof being long since due with interest as aforesaid, as in equity and conscience he was bound to do. But now so it is, that the said J. T. B. has hitherto wholly refused to pay to your orator and oratrix the balance of the said purchase money and interest or any further part thereof, sometimes pretending that he, the said J. T. B., is and hath always been ready and willing to perform the said agreement on his part, but that he cannot obtain a good and marketable title to the said land and premises, whereas your orator and oratrix charge, that the title which passed to your oratrix and her said sisters as aforesaid, under the will of the said B. B. is good and valid, and that your orator and oratrix are willing, as far as they can, to convey the same to the said J. T. B., upon being paid the balance of the said purchase money with the interest thereon; and they are further advised and insist, that your honor will compel the said Deborah, Priscilla and Rebecca, and the said William Edmonds and her

238 husband, on payment thereof, to join * with your orator and oratrix in such conveyance as may be necessary for conveying to the said J. T. B. the said title. And at other times, the said J. T. B. and the said Deborah, Priscilla, William and Rebecca his wife, pretend that your orator and oratrix are not entitled to receive the entire balance of the said purchase money, &c., but that the said sisters of your oratrix are entitled to equal proportions thereof, whereas your orator and oratrix insist, that in virtue of the before mentioned assignment, they are exclusively entitled to the same; and upon other occasions, the said J. T. B. and the said J. E. B. and O. B. B. as executors of the said B. B., pretend that the said executors are

entitled to receive the purchase money aforesaid, and insist that he, the said J. T. B. has made payments to them, for which he ought to be allowed a credit, all which actings, doings and pretences of the said defendants are contrary to, &c., and tend, &c. Prayer that J. T. B., D. W., W. E. and R. his wife, P. W., J. E. B., and O. B. B., executors of B. B., may, upon their respective oaths, true answers make, &c., and that an account may be taken of what is now due your orator and oratrix on account of the purchase money aforesaid, and interest, and that the said J. T. B., may by decree, be compelled to pay the same, or that the said lands and premises may be decreed to be sold in satisfaction thereof, your orator and oratrix insisting, that in virtue of the aforesaid assignment, they have an equitable lien thereon for that purpose; and that the said D. P. W. and R. his wife, may be decreed to unite with your orator and oratrix in such conveyance or deed, as may be necessary for transferring and assuring to the said J. T. B. and his heirs on payment of the said purchase money and interest the title aforesaid, and that your orator and oratrix may have other and further relief in these premises, &c.

Exhibit A: Know all men by these presents, that I, Benjamin Berry, of, &c., for and in consideration of the natural love and affection, which I have and bear unto my grand-daughter Eleanor Waring, have given, assigned and transferred unto her, all the purchase money for a tract of land called Good Luck, which I lately sold to a certain John T. Berry, and I do * hereby authorize the said Eleanor Waring to receive the said purchase money, and to **239** sue for and recover the same; and in case the said John T. Berry should fail to pay for the said land, I hereby give the same to her. Witness my hand and seal this 15th day of October, 1827.

BENJAMIN BERRY, [Seal.]

Exhibit B: Extract from the will of the late Benjamin Berry.

"Item. To my four grand-daughters Eleanor, Deborah, Priscilla and Rebecca Waring and their heirs forever, I give and devise all the lands purchased by me of William Kilty and Walter S. Chandler, and that part of the land purchased of John Kadle, which my said grand-daughters did occupy, and which is separated from the lands given by me to my son John E. by the courses and distances, &c., described by me in a deed to my said son John E., bearing date the 15th day of March, 1826, the said lands to be equally divided among my said grand-daughters."

The separate answer of John E. Berry admitted, that it is true that B. B., about the 1st of July, 1826, sold to a certain J. T. B., a tract of land called "Good Luck," lying and being in Prince George's County, and containing about one hundred and forty-four acres, and not containing two hundred and fifty acres, as stated by the said complainants, and that the said B. B. sold the said land to the said J. T. B., at and for the sum of thirteen dollars per acre, and not for the sum of fifteen dollars per acre, as stated by the said complainants,

and this respondent denies, that the said J. T. B. was to pay interest on the purchase, from the 1st of July, 1826, as alleged by the said complainants, but agreed to pay interest only from the 1st of January, 1827, when he took possession of said land. This respondent is competent to speak and depose particularly respecting the terms of said contract, because he was present when the same was entered into between the said parties. This respondent further admits, that the sum of fifteen dollars was paid, on the day stated by the said complainants, by the said J. T. B., in part of the said purchase money for said land, and a receipt given him for the same by the said B. B.,

240 with regard to the assignment mentioned by the said * complainants, and marked Exhibit A. This respondent alleges, that sometime in the year 1834, the complainants had recorded among the land records of Prince George's County, such an instrument, (and which was the first notice this defendant had of such pretended assignment,) purporting to have been executed by the said B. B. in his life-time, who was the father of this respondent, but whether the same was in fact executed by the said B. B., or is altogether a spurious instrument, the respondent is wholly unable to say, and prays that honorable Court will require of the complainants the strictest proof of its authenticity and genuineness; and he is advised and insists, that if it is genuine, it is nevertheless void in law, and conveys no interest to the — of the complainants; and this respondent cannot positively say whether the said J. T. B. ever had any notice of said pretended deed of assignment or instrument of writing, but does not believe that he ever had. Further answering, this respondent expressly denies that the said B. B., in his life-time, was ever willing, or intended to convey the said land to the said J. T. B., in fee simple, upon his paying the purchase money for the same to the said complainant Eleanor, as alleged by these complainants, and consequently, by his last will and testament gave and devised the said tract of land, together with other parcels or tracts of land, to his four grand-daughters, to wit, the complainant E., D. W., Rebecca, now wife of W. E., and P. W., and as stated by the said complainants, as appears from the extract taken from said will, which is a true extract, and marked Exhibit B, by the complainants, and made a part of their bill of complaint. This respondent, admits that the said will bears date the 18th of December, 1827. This respondent further admits, that the said B. B., by his last will and testament, appointed himself, O. B. B., and a certain Spencer Mitchell, his executors thereof, and that after the said Spencer Mitchell declined accepting the trust confided to him in part by the said will, letters testamentary were in due form granted thereon to this respondent and the said O. B. B. Further answering, this respondent says, that he does not know that the said

241 J. T. B., ever made any payments * to the said complainants, or either of them, in virtue of said pretended assignment;

that this complainant, as one of the executors of B. B. aforesaid, about the 20th October, 1828, gave the said complainant Eleanor, an order on the said J. T. B., which he believes was accepted and paid, and he presumes that this is the first payment mentioned by the said complainants as having been made by the said J. T. B. to them, in virtue of the said assignment, and this respondent states that he recollects that about the last of July, 1832, he gave, as executor as aforesaid, a similar order on the said J. T. B., in favor of the said E., and which he believes was accepted and paid by the said J. T. B. in pursuance of this respondent's order; and this respondent further states, he never did recognize the said complainant E. as assignee of the purchase money for said land, and he does not believe that J. T. B. ever did, and he believes that this last mentioned order as the second payment of \$56.56, alleged by the said complainants to have been made them by the said J. T. B., in virtue of said assignment. This respondent further answering, says, that it is true that he has always denied the right of the complainants, or either of them, to receive any part of the said purchase money from the said J. T. B., and always claimed the right to receive it himself as one of the executors, and believed that he was entitled to it as residuary legatee of his father, and that the said J. T. B. has, at divers times, made this respondent, as co-executor as aforesaid, large payments on account of said lands, and has also, he believes, made the said O. B. B., as co-executor of said B. B., large payments on said land, for which he is entitled to a credit. And this defendant denies all and all manner of confederacy, &c.

The other parties having answered the bill or been proceeded against by publication, it was then agreed that the bill should be treated as amended, by charging that the assignment by B. B., deceased, to the complainant E., mentioned in the proceedings, was intended and designed for the common benefit of herself and sisters, and that the devise of the land sold by said Berry to the defendant J. T. B., which is to be found in the last will *and testament of the said Berry, deceased, was made to give full effect to **242** the aforesaid assignment to the said complainant, E., and also, by stating the agreement between the said B., deceased, and the said defendant J. T. B., in regard to the price of the land sold as aforesaid and the period from which the purchase money is to bear interest, so as to conform to the admissions contained in the answers in these respects; that the answers already filed shall be treated as answers to the said amendment, and the testimony is to be treated as testimony taken after issue joined upon such amended bill and answers thereto. It is further agreed, that if the Chancellor shall decree in favor of the complainants, the cause shall go to the auditor for an account, and liberty shall be given to each party to introduce testimony before the auditor in regard to the precise quantity of land sold.

The defendant John E. Berry filed his points and exceptions as follows, to wit :

1st. That the assignment to Eleanor Waring, referred to in the bill of complaint, was fraudulent and void, and was not recorded as it ought to have been.

2nd. That the devise to the said Eleanor and her three sisters, under the will of Benjamin Berry, of the tract of land called Good Luck, sold to the defendant John T. Berry, was a void devise, he having sold the said lands to John T. Berry anterior to his death.

3rd. That the proceeds of said sale to John T. Berry belonged to John E. Berry, as residuary legatee under the said Benjamin Berry's will.

4th. That the complainants cannot recover against the said John E. Berry in this case, because the Chancellor has not jurisdiction; they should have sued him at law to recover such part of the money claimed by them as they could prove this defendant had received from John T. Berry, and failed to pay it over to them.

5th. Because they do not ask for a decree against this defendant, and such a decree does not come within the scope of their bill, nor within its prayer.

243 *Exceptions of John E. Berry to the sufficiency of the averments and allegations in the complainant's bill.

1. There is no averment or allegation in the complainant's bill that John E. Berry, as executor of Benjamin Berry, received any payments from John T. Berry on account of the purchase of the tract of land called Good Luck, mentioned in the proceedings, as there ought to have been to authorize a decree against John E. Berry in this case.

2. The bill does not aver or allege that John E. Berry, as trustee, executor or agent, received any payments from John T. Berry, as it ought to have done to authorize a decree against him.

On 5th November, 1841, the Chancellor [BLAND,] ordered that this case be and the same is hereby referred to the auditor, with directions to state an account, shewing the amount of the purchase now due to the said devisees of the vendor, to whom the vendor's lien has passed. The purchaser John T. Berry and the executor John E. Berry are to be regarded as the only defendants personally liable, the purchaser on the ground of his contract, and the executor on the ground of his receipt and failure to apply the money, as in equity he was bound to do. The parties are hereby authorized, according to the terms of their agreement, filed on the second instant to have a survey made of the land sold, by the surveyor of Prince George's County, or to take testimony in relation to the said account, before any justice of the peace, on giving three days notice, provided that such survey be made or testimony taken and filed in the Chancery office, in this case, on or before the 15th day of January next.

A survey was accordingly made, and the quantity of land sold admitted.

On the 8th March, 1842, the auditor reported accounts A and B.

Account A is a statement of the debt due by the defendant John T. Berry, for his purchase of land from Benjamin Berry, deceased, in which he is charged with the purchase money, according to the agreement filed 2d November, 1841, and *credited with the several payments admitted and proved to have been made to the executors of the deceased, as well as to the complainant Eleanor and her sisters. The balance shown to be due with interest to the date of this report, has been distributed, at the foot of this account, amongst the complainants and defendants, sisters of the said Eleanor. This distribution has been made, although the sisters are not complainants, because the complainants have called upon them to join in a conveyance on the payment of the balance of the purchase money, and the defendant John T. Berry has offered himself ready to pay the same, whenever directed so to do. **244**

In account B, John E. Berry, one of the executors of the deceased, has been charged with that part of the purchase money received by him from the defendant John T. Berry, and with interest thereon to the date of this report. The amount shown by this account has, at the foot thereof, been distributed in the same manner and for the same reasons as in account A, and in making that distribution the auditor has credited the executor with his payments to the complainant Eleanor, before her marriage, and to the defendant Priscilla, by deducting the same, with interest, as charged to him in the account, from their respective shares.

The defendant John E. Berry, excepted to the auditor's report and statement made and filed in this case, and prays the same may not be ratified by the Chancellor, except as to the amount awarded to Henry A. Pierson and Eleanor, his wife, to wit, the sum of \$112.64; to that extent he is willing that the report and statement be ratified for the following reasons and causes :

1. Because the said William Edmonds and Rebecca, his wife, Priscilla Waring and Deborah Waring were co-defendants with this exceptant, and they therefore cannot recover in this proceeding.

2. Because these parties should have been complainants to enable them to recover against this exceptant.

3. Because this exceptant has had no opportunity of defending himself against the claim of these co-defendants.

* 4. Because their claim is barred by the Statute of Limitations which he pleads now to the same, and he pleads the Statute of Limitations to each and every one of the claims of the said William Edmonds and Rebecca, his wife, of Priscilla Waring and Deborah Waring, respectively, as allowed and reported against this exceptant in account B, by the auditor. **245**

5. Because the whole proceeding is irregular.

6. Because the allegations and averments in the original and amended bills of complaint are insufficient to entitle the said parties and co-defendants with this exceptant to recover against him.

On the 15th day of April, 1842, the parties filed the following agreement:

"We, the undersigned, solicitors for our respective clients, consent and hereby agree, that the auditor's account and report marked A, and filed in this cause, shall be ratified and confirmed by the Court at once; and also agree and consent that a decree may be passed, ordering and directing that a deed in fee simple, executed and acknowledged according to law, shall be given by Henry A. Pierson and Eleanor, his wife, William Edmonds and Rebecca, his wife, Deborah Waring and Priscilla Waring to John T. Berry, for the land and real estate mentioned in the proceedings, upon the payment to them of the sum of \$1,231.90, with interest, in the manner and proportions as stated in the auditor's account A aforesaid.

This agreement is not to affect account B of the auditor, as to questions arising in reference to it between the parties to the above cause. But the said account B, with the exceptions thereto, are submitted to the Chancellor for decision according to the usual principles."

On the 18th of April, 1842, the Chancellor [BLAND,] decreed, that the auditor's report, filed on the 8th of March last, be ratified and confirmed, and that the exceptions thereto filed, be and the same are hereby overruled. And it is further adjudged, ordered and decreed, that the defendant John T. Berry forthwith pay, or bring into this Court to be paid, unto the complainants the sum of, &c., and **246** unto the defendants William * Edmonds and Rebecca, his wife, the sum of, &c., and unto the defendant Deborah Waring, the sum of, &c., and unto the defendant Priscilla Waring, [the sum of, &c., and that on payment of the aforesaid sums of money, with interest as aforesaid, or bringing the same into Court, John B. Brooke, of Prince George's County, shall be and hereby is appointed trustee, with power and authority, for and in the name of the complainants and the defendants William Edmonds and Rebecca, his wife, Deborah Waring and Priscilla Waring, to convey unto the defendant John T. Berry and his heirs, by a good and sufficient deed, &c.

And it is further adjudged, ordered and decreed, that the defendant John E. Berry forthwith pay, or bring into this Court to be paid unto the complainants, the sum of \$112.64 $\frac{3}{4}$, with interest thereon from the 8th day of March last, and unto the defendants William Edmonds and Rebecca, his wife, the sum \$439.67 $\frac{3}{4}$, with interest thereon from the 8th day of March last, and unto the defendant Priscilla Waring, the sum of \$396.75 $\frac{3}{4}$, with interest thereon from the 8th day of March last, and unto the defendant Deborah Waring, the sum of \$439.67 $\frac{3}{4}$, with interest thereon from the 8th day of March last. And it is further adjudged, ordered and decreed, that the defendants John T. Berry and John E. Berry pay to the complainants their costs of suit, to be taxed by the register.

From this decree, John E. Berry appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

C. C. Magruder and Pratt, for the appellants.

Alexander, for the appellee.

ARCHER, J. delivered the opinion of this Court. Exceptions, in pursuance of the Act of 1832, ch. 302, have been taken to the sufficiency of the averments in the bill, to charge John E. Berry, the present appellant, with the sum decreed against him.

* The questions, therefore, which have been raised in this Court against the sufficiency of the bill, are open for our consideration. **247**

The bill and its amendment have been filed manifestly with the design of compelling the specific execution of a contract, in obtaining from John T. Berry the balance of the purchase money due from him for the purchase of a tract of land from Benjamin Berry. There is not only no allegation, but no intimation in the bill that any of the purchase money, has come into the hands of John E. Berry, either as executor of Benjamin Berry or otherwise, and therefore no foundation whatever furnished for any decree against him for any portion of the purchase money. Whatever may be the proof, no decree, but upon proper and corresponding allegations, can be passed. The adherence to this familiar principle is necessary to prevent surprise and consequent injustice. The decree must therefore, upon this ground, be necessarily reversed.

That upon proper allegations, which the facts of the case would have justified, the Court of Chancery would have had jurisdiction to have decreed the payment over to the parties entitled, their proportion of the purchase money, we entertain no doubt. The right to the purchase money is claimed by John E. Berry, as residuary legatee of Benjamin Berry, and it was proper, therefore, that he should be a party to the controversy, that full and complete justice might be administered to all the parties interested. It was necessary for the safety of the vendee, who was about to be compelled to pay the purchase money, that all the contested rights to the purchase money should be adjusted.

We apprehend there is sufficient proof in the record of the receipt of the sum of money, part of the purchase money, by John E. Berry, which is stated in account B. His answer admits the receipt of large sums of money, which he asserts belongs to him as residuary legatee of Benjamin Berry, and in account A, it is stated, that there was paid to John E. Berry, one of the executors of Benjamin Berry, as per receipt, filed 16th August, 1829, the sum of \$791.92. The

ratification of * this account was had by consent of John E. Berry and the other parties to the case, which, we apprehend, constituted sufficient evidence of the receipt of the money.

To the ratification of account B, John E. Berry has excepted, and among other reasons, that the claim against him is barred by limitations. It is no objection to this defence, that it was not taken in the answer, because, as we have seen, the bill gave him no intimation that any claim would be made against him, by any allegation contained therein, and the defence was taken as soon, as by the proceedings he had notice that any claim was to be made against him.

Limitations, however, it is said, constitutes no defence. The money was received in 1829, and the bill was filed in 1835. Thus a period of six years had elapsed from the receipt by John E. Berry, of the purchase money with which he is attempted to be charged and the filing of the bill. The lapse of such a period, as would bar at law, an action for money had and received, would, by analogy, bar this claim in equity. It is true that John E. Berry, in the receipt of this money, might be considered as a *quasi* trustee, and as having received it for the use of those to whom it belonged, but he was not acting under a continuing or express trust, but his duty was to pay it over immediately on its receipt, and an action at law might have been maintained for its recovery; the statute ought therefore to be considered as running from the time of the receipt of the money.

The rights acquired to this purchase money were by assignment, and not by last will and testament. The admission of the parties is, that the devise of the land was, with the view of confirming the claim under the assignment. The claim, therefore, does not partake of the character of a legacy, so that limitations would not attach. Limitations, then, in our view, being a bar to the claim against John E. Berry, and such defence having been interposed, we deem it fruitless to remand the cause to the Court of Chancery for further proceedings.

So far, therefore, as the decree affects the appellant, (except, in so far as the same was passed by consent,) it is reversed.

Decree reversed in part.

249 * THE STATE OF MARYLAND *vs.* JOHN M. CARLETON, SAMUEL M. SEMMES and JOHN P. CARLETON.—December, 1843.

Where the condition of a collector's bond was that he "shall well and truly account for and pay over to the treasurer of the State, the several sums of money which he shall receive or be answerable for by law, at such

time as the law shall direct," it is no change or alteration of the terms of the contract, that the Legislature appointed a more distant day, than the one fixed when the bond was executed, for the payment of the money collected into the treasury.

The granting of indulgence by law to a principal collector of the State does not discharge his sureties, though without their consent. (a)

The Legislature, at their pleasure, and whenever the interest or inconvenience of the State requires it, may alter the time at which the collectors of taxes are required to pay the public dues into the treasury.

Where, on a collector's bond, the breach assigned by the State was the non-payment into the treasury of the taxes received, and the defendants pleaded general performance by the collector, and no assessment imposed by the commissioners of the county, on which pleas issues were joined, and the jury found that the defendants did not owe the State any sum, as the State hath within by its pleadings alleged. *Held*, that the verdict was defective in not finding the matters put in issue by the pleadings, and no judgment could be entered upon it. (b)

APPEAL from Allegany County Court. This was an action of debt, commenced by the State on the 26th September, 1843.

The State of Maryland, at the time of prosecuting its writ of *capias ad respondendum*, filed in Court the following account, notices and collector's bond, to wit:

(a) Followed in *State vs. Swinney*, 60 Miss. 39, (cited in 29 Albany, L. J. 124,) where the Court said: "We decline to follow the Courts of Illinois, Tennessee and Missouri, in their view that sureties on the bond of a tax collector are discharged by an Act of the Legislature passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer, and we embrace and declare the more just and politic doctrine of the Courts of Virginia, Maryland and North Carolina, and hold that the official bond of the tax collector is given with a full knowledge of the right of the Legislature to alter the dates fixed by law for the collection of taxes and the settlement of the collector, and subject to the exercise of that right at the pleasure of the Legislature, without the assent of the sureties." See *U. S. vs. Kirkpatrick*, 9 Wheaton, 720; *U. S. vs. Vanzandt*, 11 Wheat. 184; *U. S. vs. Boyd*, 15 Peters, 187, holding that the provisions of law requiring periodical settlements by officers are directory merely, and cannot be availed of by the sureties of an officer, and that such sureties are not discharged by the omission of the Government officers to enforce the law as to periodical accounting, laches not being imputable to the U. S. The regulations as to accounting constitute no part of the contract of the surety.

(b) Cited in *Hatton vs. McClish*, 6 Md. 418, holding that where issues are joined on the pleas of *non assumpsit* and no assets, and the jury by their verdict find the first issue in favor of the plaintiff, but say nothing as to the second, the verdict is bad, but that the Appellate Court cannot notice the defect without a motion in arrest of judgment. A motion in arrest of judgment presents the question whether any judgment should be rendered. *Susser vs. Walker*, 5 G. & J. 62. Rev. Code, Art. 71, sec. 7, does not apply to motions in arrest. *State vs. Greenwell*, 4 G. & J. 284.

DR. *John M. Carleton, Collector of Allegany County, in account with the State of Maryland.*

For the Direct Tax for 1841.....\$8,017 12

CR. By cash, &c., as of 1st
Sept. 1843.....\$6,150 00

By his allowance for
insolvencies..... 431 81

6,581 81

\$1,435 31

Interest on \$1,435.31, from 1st Sept. 1843.

J. S. OWENS, Treas. W. S. Md.

22nd September, 1843.

250 * *To John M. Carleton, Esq., Collector of the State Tax:*

SIR,—Above you are furnished with a claim of the State of Maryland against you, which you have withheld more than three months after the same is due. You are hereby notified that the account of the said State against you, of which the above is a true copy, stated and signed by the treasurer of the Western Shore of Maryland, has been filed in the office of the clerk of Allegany County Court, and that I shall make a motion for judgment against you on the said claim at the next term of said County Court, to be begun and held at Cumberland, on the second Monday of October, next after the date of this notice.

HANSON B. PIGMAN,

Deputy Attorney-General, in and for Allegany County, Md.
Cumberland, September 26th, 1842.

DR. *John M. Carleton, Collector of Allegany County, in account with the State of Maryland.*

For the Direct Tax for 1841.....\$8,017 12

CR. By cash, &c., as of 1st
Sept. 1843.....\$6,150 00

By his allowance for
insolvencies..... 431 81

6,581 81

\$1,435 31

For interest on \$1,435.31, from 1st Sept. 1843.

J. S. OWENS, Treas. W. S. Md.

22nd September, 1843.

To Samuel M. Semmes and James P. Carleton, Esq's:

SIRS,—Above you are furnished with a claim of the State of Maryland against John M. Carleton, Esq., collector of the State tax, whose sureties you are, which he has withheld more than three months after the same is due. You are hereby notified that the account of the said State against him, of which the above is a true copy, stated and signed by the treasurer of the Western Shore of

Maryland, has been filed in the office of the clerk of Allegany County Court, and that I shall move for a judgment against the said John M. Carleton and you his sureties, on the said claim at the next term of Allegany County * Court, to be begun and held at Cumberland, on the second Monday of October, next after the date **251** of this notice.

HANSON B. PIGMAN,

Deputy Attorney-General, in and for Allegany County, Md. Cumberland, September 26th, 1843.

Know all men by these presents, That we, John M. Carleton, James P. Carleton and Samuel M. Semmes, are held and firmly bound unto the State of Maryland in the just and full sum of twenty thousand dollars, to be paid to the said State of Maryland, or its certain attorney, to the payment whereof well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 20th day of December, in the year eighteen hundred and forty-one. Whereas, the above bound John M. Carleton has been appointed by "the commissioners of Allegany County," collector of the tax under the Act of the General Assembly of Maryland, passed at an extra session begun and held at Annapolis on Wednesday the 24th day of March, 1841, and ended on Wednesday the 7th day of April, 1841, chapter twenty-three.

Now the condition of the above obligation is such, that if the above bounden John M. Carleton, appointed collector as aforesaid, shall well and faithfully execute his office as such collector, and the several duties required of him by law, and shall well and truly account for, and pay over to the Treasurer for the Western Shore of the State of Maryland, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct, then the above obligation to be void, else to remain in full force and virtue.

JNO. M. CARLETON, [Seal.]

SAMUEL M. SEMMES, [Seal.]

JAMES P. CARLETON, [Seal.]

Signed, sealed and delivered in the presence of Geo. W. Devecmon, Wm. Conrad.

MARYLAND, ss. Be it remembered, that on this 20th day of December, 1841, personally appears George W. Devecmon * and William Conrad, subscribing witnesses to the above bond, **252** before me the subscriber one of the justices of the peace in and for Allegany County and State aforesaid, and severally made oath on the Holy Evangely of Almighty God, that they did see John M. Carleton, James P. Carleton and Samuel M. Semmes, obligors in the above bond, sign, seal and acknowledge the same as their act and deed, and the said George W. Devecmon and William Conrad did subscribe their names as witnesses thereto. Sworn before

JACOB FECHTY, [Seal.]

On the back of the foregoing bond it is thus endorsed, to wit,
 "Dec. 22nd, 1841,—Bond approved by commissioners.

Test, GEO. W. DEVEGON, Clerk."

True copy, Test: Jno. M. Carleton, Clerk to the commissioners of Allegany County. September 26th, 1843.

The declaration, after setting forth the bond and its condition, assigned for breach thereof, that the said John M. Carleton, in the said writing obligatory mentioned, did not, from the making of the same, well and faithfully execute the said office of collector of the tax, and did not well and truly pay all sums of money received by him, and did not in respect thereto well and truly execute and perform the several duties required of him by the laws of this State. By means of which said several premises the said State hath sustained damage to a large amount, to wit, the sum of two thousand dollars, current money, and thereby an action hath accrued to it to demand and have of and from the said defendants the sum of twenty thousand dollars, current money, to wit, at the county aforesaid, above demanded; yet the said defendants although often requested, have not paid the said sum of, &c.

A copy of the account and notices were made and sent with the said writ to the sheriff of the county aforesaid, thereon endorsed, to be served on the defendants with the writ, for plea or judgment the first term. Which were duly returned served.

John M. Carleton, the collector, after oyer, pleaded:

1st. General performance.

253 * 2nd. That the commissioners of Allegany County did not immediately, or at any other time before or after the correction, adjustment and confirmation of the valuations directed to be returned to them under the Act of the General Assembly of this State, entitled "an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State," passed at the March Session, 1841, chapter 23, impose an assessment or tax of twenty cents or one-fifth of one per cent. in every hundred dollar's worth of assessable property within their jurisdiction, (and that they did not impose any assessment or tax whatsoever on the assessable property within their jurisdiction, under and by virtue of the said last mentioned Act of Assembly as they were required to do, and which should have been done before the said John M. Carleton was by law authorized to collect any such assessment or tax, to wit, on the 1st April, 1843,) to wit, at the county aforesaid, and this he is ready to verify; wherefore, &c.

Samuel M. Semmes and James P. Carleton after oyer, pleaded:

1st. General performance by John M. Carleton.

2nd. That they entered into and became parties to the said writing obligatory, as sureties for the said John M. Carleton, and that the said plaintiff, by an Act of its General Assembly, passed December Session, 1841, ch. 116, entitled, a supplement to the Act for the

general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at March Session, 1841, ch. 23; and also by a further Act of the said General Assembly, passed December Session, 1842, ch. 269, entitled, an Act further supplementary to an Act, entitled, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed March Session, 1841, ch. 23, extended the time for the payment into the treasury of said State, of the taxes collectable in Allegany County for the year 1841, under the Act, entitled, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, being the taxes within the purview of the said writing obligatory, and otherwise gave indulgence to the *said John M. Carleton, without the privity or consent of the said Samuel M. Semmes and James P. Carleton, to wit, at, &c., and this they are ready to verify; wherefore they pray, &c. **254**

3rd. That the said plaintiff ought not to have and maintain its action aforesaid against them, because they say, that the commissioners of Allegany County did not immediately, or at any other time before or after the correction, adjustment and confirmation of the valuations directed to be returned to them under the Act of the General Assembly of this State, entitled, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March Session, 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per cent. in every hundred dollar's worth of assessable property within their jurisdiction, (and that they did not impose any assessment or tax whatsoever on the assessable property within their jurisdiction, under and by virtue of the said last mentioned Act of Assembly, as they were required to do, and which should have been done before the said John M. Carleton was by law authorized to collect any such assessment or tax, to wit, on the 1st day of April, 1843,) to wit, at, &c., and this they are ready to verify; wherefore they pray, &c.

The State replied to the plea of the said John M. Carleton, first, (separately) above pleaded, that he the said John M. Carleton hath not, from the time of making the said writing obligatory aforesaid, hitherto well and faithfully observed, performed, fulfilled and kept, all and singular, the matters and things in the condition of the said writing obligatory mentioned and contained, which he, according to the condition thereof, ought to have observed, performed, fulfilled and kept, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

And as to the second plea of the said defendant John M. Carleton, by him secondly (separately) above pleaded, the said State says, that the said plaintiff, its aforesaid action against him the said defendant, John M. Carleton, to have and maintain ought, because the said

255 State says, that the commissioners * of Allegany County did, immediately after the correction, adjustment and confirmation of the valuations directed to be returned to them under the Act of the General Assembly of this State, entitled, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March Session, 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per centum in every hundred dollars worth of assessable property within its jurisdiction, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

And the said State, as to the said first plea of the said defendants Samuel M. Semmes and James P. Carleton, by them first above pleaded, says, that the said John M. Carleton, in the condition of the said writing obligatory mentioned, hath not, from the time of making the writing obligatory aforesaid, hitherto well and faithfully observed, performed, fulfilled and kept, all and singular, the matters and things in the condition of the said writing obligatory mentioned and contained, which he, according to the condition thereof, ought to have observed, performed, fulfilled and kept, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

The State demurred generally to the second plea of S. M. S. and J. P. C.

And as to the third plea of the said defendants S. M. S. and J. P. C., the said State says, that the said commissioners of Allegany County did, immediately after the correction, adjustment and confirmation of the valuations directed to be returned to them under the Act of the General Assembly of this State, entitled, an Act for the general valuation and assessment of property in this State, and to provide a tax to pay the debts of the State, passed at the March Session, 1841, ch. 23, impose an assessment or tax of twenty cents or one-fifth of one per centum in every hundred dollars worth of assessable property within their jurisdiction, to wit, at the county aforesaid, and of this the said State puts herself upon the country, &c.

The County Court rendered judgment on the demurrer to the second plea for the defendants S. M. S. and J. P. C., and that **256** * the said State of Maryland take nothing by her writ and declaration aforesaid, and the said Samuel M. Semmes and James P. Carleton go thereof without day.

A jury was then sworn, who found a verdict, that the said John M. Carleton, Samuel M. Semmes and James P. Carleton do not owe the said State of Maryland the sum of \$20,000, or any part thereof, in manner and form as the said State of Maryland hath within by her pleading alleged.

At the trial it was agreed that all errors in pleading be and they are hereby released, it being the wish of said counsel to try the merits alone of the questions involved.

The verdict and judgment being for the defendants, the State prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

Hanson B. Pigman, Deputy Attorney-General, for the State.

* *G. A. Pearre*, for the appellee.

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STEPHEN, J. delivered the opinion of this Court. The principal question involved in this case is an important one, although, according to our views, the merits of it lie within a very narrow compass. It is an action upon the collector's bond of Allegany County, and his two sureties, given to secure the faithful performance of the duties of the office of collector of the direct tax of that county. The action was a joint one against the principal and his sureties; and the sureties pleaded that time had been given by law, without their consent, to their principal, for the payment of the taxes into the treasury, by which extension of time they were discharged by law from all responsibility under or by virtue of their said bond. To this plea there was a demurrer, and the Court below overruled the demurrer, and gave final judgment against the State, and in favor of the two sureties. The Court then proceeded to try the issues in fact, and upon the finding of the jury, that nothing was due to the State, gave likewise a final judgment in favor of all the defendants upon such verdict. We think there was error in the judgment of the Court below, and that the same ought to be reversed.

The condition of the bond is, that the principal shall well and truly account for and pay over to the treasurer the several sums of money which he shall receive or be answerable for by law, "at such time as the law shall direct." The extension of the time of payment therefore by the Legislature was no change * or alteration of the terms of the contract, but was warranted and authorized by **258** the express language of the condition of the bond upon which the suit was instituted. The principle, therefore, that time given to the principal debtor by the creditor, without the consent of the sureties, will operate their discharge, cannot be applied to this case. The terms of the condition of the bond, reserved to the State a right to grant the indulgence by law, if she thought fit to do so, without affecting in any manner the liability of the sureties. But it is not necessary to rely upon the condition of the bond alone for the reversal of the judgment of the Court below. A similar question was brought before the Court of Appeals for the Eastern Shore from Worcester County several years ago, and the Court then decided, that the granting of indulgence by law to the principal collector, did not operate to discharge his sureties. The law was not considered as binding or obligatory upon the State, but alterable by the Legis-

lature, at their pleasure, whenever the interest or convenience of the State might require it.

We therefore think that there was error in the judgment of the Court below, rendered upon the demurrer to the second plea of the sureties, in which they rely as a defence to the action upon the extension of time granted to their principal by law, without their privity or consent, for the payment of the taxes into the treasury; such defence being legally insufficient and untenable. The demurrer should have been ruled good, and judgment given thereon for the plaintiff. After refusing to sustain the demurrer of the plaintiff to the second plea of the sureties, founded upon the indulgence granted to the principal, the Court proceeded to try the issues in fact, and for that purpose ordered a jury to be sworn. Those issues were made up from pleas pleaded separately by the principal, and jointly by the sureties. Those pleas were performance, and that no tax was imposed by the commissioners of Allegany County, according to law. The State replied generally, that the principal had not performed the duties imposed upon him by the condition of his bond, and that the tax had been imposed by the commissioners according to law. No breaches were assigned * conformably to the provisions of the Statute of 8 and 9 William 3rd, upon that subject. The jury, by their verdict, found that nothing was due from the defendants to the plaintiff, and upon that verdict, judgment was given by the Court below in favor of the defendants. In rendering such judgment, there was, we think, manifest error, because the matters put in issue by the pleadings were not found by the jury, and the verdict being therefore defective in point of law, no judgment could legally be entered upon it.

Upon the subject of interest, we think that no difficulty can exist. The extension of time by law being warranted and sanctioned by the terms of the condition of the bond, and being in nowise binding or obligatory on the State, there was no such a variation of the terms of their contract, in reference to the subject of interest, as could operate to discharge the sureties, or affect, in any manner, their liability. We are, therefore, of opinion, that the judgment of the Court below ought to be reversed, and a *procedendo* ordered.

Judgment reversed, and procedendo awarded.

SAMUEL MCARTHUR *vs.* J. A. MARTIN and JOHN McDERMOTT,
special bail of DAVID C. MARTIN.—December, 1843.

Upon a *scire facias* against special bail, where the defendant did not plead to the writ, but moved the Court to enter an *exoneretur*, which being done, the plaintiff thereupon appealed. This Court dismissed the appeal, there being no final judgment in the cause.

APPEAL from Frederick County Court. On the 7th December, 1841, Samuel McArthur sued out a *scire facias* against the appellees, which recited a judgment rendered in his favor, against D. C. Martin at February Term, 1840, of Frederick County Court. The bail appeared and suggested on the record, that their principal "has applied in due form of law for the benefit of the bankrupt laws of the United States, and that he made his application on the 2nd March, * 1842." The Court ruled the plaintiff to show cause on or before the 8th March, 1842, why an *exoneretur* should not be entered, provided notice of the rule be served on the plaintiff on or before the 4th March. On the 3rd March, the commissioner under the bankrupt law for Frederick County, made oath, that D. C. M. had applied in due form for a release, &c. The notice of the rule was served on the appellant's attorney, and the docket entries of the District Court of the United States, which showed an order for the hearing of the application on the 31st March, 1842, were filed in the cause duly certified. On the 8th March, the appellant showed cause against the rule, but the County Court made the rule absolute, and ordered the *exoneretur* to be entered. The plaintiff appealed. **260**

The cause was argued before STEPHEN, ARCHER, CHAMBERS, and SPENCE, JJ.

Palmer, for the appellant. Brengle, for the appellee.

BY THE COURT—

Appeal dismissed.

JOHN F. CONOLLY vs. KETTLEWELL & WILSON.—December, 1843.

It is the province of the jury to decide all questions of fact of which evidence legally sufficient for that purpose is laid before them, and it is equally the right and duty of the Court to decide all questions of law arising upon the facts, when found and ascertained by the jury.

The plaintiff proved that all the articles mentioned in his account, were selected by S. and that he refused to deliver them until he saw the defendant. He then asked the defendant, "will you pay for the goods if delivered to S. and he did not?" Defendant answered, if S. did not pay he would. The goods were then entered on the plaintiff's books, "secured by" defendant. Under such circumstances, the defendant cannot require the Court to say to the jury, "that the promise to see the plaintiff paid, if S. did not pay, not being in writing, is void by the Statute of Frauds, and plaintiff cannot recover," as it took from the jury the right of finding the truth of the facts of which evidence had been offered. (a)

In effect, the proof in the case, if believed by the jury, subjected the defendant to separate and secondary, and not an original or a joint responsibility. (b)

(a) Approved in *Cropper vs. Pittman*, 13 Md. 195.

(b) Approved in *Glenn vs. Rogers*, 3 Md. 322; *Ellicott vs. Peterson*, 4 Md. 492; *Railway Co. vs. Prentiss*, 11 Md. 128; *Cropper vs. Pittman*, 13 Md.

261 * Where the plaintiff below obtained a verdict, and the defendant brought the cause before this Court on exceptions, and it appeared that the contract relied on and proved, was void under the Statute of Frauds, being a collateral, and not an original undertaking. After a reversal of the judgment, the plaintiff's motion for a *procedendo* was overruled. (c)

APPEAL from Baltimore County Court. This was an action of assumpsit, brought by the appellees against the appellant, on the 16th of May, 1840, for goods sold and delivered. The defendant pleaded *non assumpsit* and limitations, on which issues were joined.

1st Exception. The plaintiff, to support the issue on his part, proved by John Higinbotham, that he was the clerk of the plaintiff in 1836 and 1837, and at the time when the articles charged in the account of the plaintiff, as following, were sold and delivered.

"Mr. JAMES STERLING, secured by John F. Conolly,

Bought of Kettlewell, Wilson & Hillard."

1837, Feb. 13. 1 bb'l 1st quality sugar, bb'l 25c. 237 lbs. at 10c. \$23.95, &c. Amounting in the whole to \$624.16."

That all the articles in said account were selected by James Sterling and by one of the plaintiffs; entered in the day-book of plaintiffs to James Sterling, as follows: "Mr. James Sterling, bought of Kettlewell, Wilson & Hillard." But the goods therein contained were not delivered by the plaintiffs, and the plaintiffs refused to deliver them to Sterling until they saw the defendant. That plaintiff then asked Conolly, will you pay for these goods if delivered to Sterling, and if Sterling did not. That Conolly answered the plaintiffs, that if Sterling did not pay the amount of the goods,

195; *Myer vs. Grafflin*, 81 Md. 355. See *Elder vs. Warfield*, 7 H. & J. 284. To constitute an original undertaking to pay for services to be rendered another, it is necessary that they should be rendered not only at the instance and request, but also upon the credit, of the party undertaking to pay for them. *Railway Co. vs. Prentiss*. In *Myer vs. Grafflin*, the Court said that the doctrine of *Elder vs. Warfield* and *Cropper vs. Pittman*, as well as of *Conolly vs. Kettlewell*, "is that where credit is given to one on the promise of a third party 'to see him paid,' the undertaking of the latter is collateral and void under the statute, unless in writing, and where the party undertaken for is originally liable on the same contract, the promise to answer for that liability is a collateral and not an original undertaking, unless there is a new and superadded consideration moving between the party promising and him to whom the promise is made. But it is conceded in *Cropper vs. Pittman*, that it does not follow in every case where the words, 'I will see the bill paid,' are used, they necessarily import a collateral undertaking. If accompanied by other words or facts sufficient to authorize a jury to find from all the evidence that *credit was given* to the party using them, and the jury so find, he will be held responsible. It is decided in *Cropper vs. Pittman*, following in this respect *Conolly vs. Kettlewell*, that such words *standing alone* import a collateral undertaking, and the jury must be so instructed as to their legal effect."

(c) Approved in *Cropper vs. Pittman*, 18 Md. 196.

he would pay; and that afterwards, on the books of the plaintiff, in the account of Sterling, the following words were written, "secured by John F. Conolly," by the plaintiffs, and the goods were, after said promise, delivered by the plaintiffs to Sterling; and further proved, that the said Sterling had previously applied to purchase goods from the plaintiffs on his own credit, and had been refused. Whereupon the defendant moved the Court to give the following instruction:

* "That in this case the promise to see the plaintiffs paid, if Sterling did not pay, not being in writing, is void by the Statute of Frauds, and plaintiff cannot recover." Which instruction the Court [ARCHER, C. J., and PURVIANCE, A. J.,] refused to give. The defendant excepted. **262**

2nd Exception. The plaintiff having offered the evidence in the preceding exception, and which is made part of this, the defendant further prayed the Court to instruct the jury as follows to wit: "That there is no evidence in this cause to shew that there was a joint responsibility of Sterling and Conolly for the sale and delivery of the goods to Sterling, now sought to be recovered." Which instruction the Court refused to give. The defendant excepted.

The cause was argued before STEPHEN, DORSEY, and SPENCE, JJ.

Richardson, D. A. G., for the appellants.

McMahon, for the appellees.

STEPHEN, J. delivered the opinion of this Court. We think the Court were clearly right, in refusing to grant the defendant's first prayer, made in this case. It was an action founded upon a collateral promise to pay the debt of another person, to whom goods were delivered by the plaintiffs. The prayer to the Court was to instruct the jury, that the promise of the defendant to see the plaintiffs paid, if the principal debtor did not pay, not being in writing, was void by the Statute of Frauds, and the plaintiff, therefore, could not recover. It is the province of the jury to decide all questions of fact, of which evidence legally sufficient for that purpose is laid before them; and it is equally the right and duty of the Court to decide all questions of law, arising upon the facts, when found and ascertained by the jury. The granting of the prayer made by the defendant of this case, would have violated this well established principle in law, defining the jurisdiction of the Court and the jury in the administration of civil justice. The Court were called upon to assume the existence of facts * which it was the exclusive province of the jury to find. The prayer assumes the truth of the facts of which evidence had been given, without submitting the verity thereof to the finding of the jury. To have granted such a prayer, **263**

would have been an unwarranted encroachment upon the province of the jury, and it was therefore properly refused by the Court.

We think there was error in the refusal of the Court below to grant the defendant's second prayer. The undertaking of the defendant, according to the proof in the cause, clearly subjected him to a separate and secondary, and not an original or joint responsibility. The contract was to pay, if the person to whom the goods were delivered did not. The goods were charged to him in the day-book of the plaintiffs, and the plaintiffs refused to deliver them until they saw the defendant. When they saw the defendant, they asked him if he would pay for the goods, if the party to whom they were to be delivered, did not pay. And it is proved, that his undertaking was expressly a conditional one to pay, if the person to whom the goods were delivered, did not pay. That this was a collateral and not an original undertaking, is clearly established by the case of *Elder vs. Warfield*, to be found in 7 *H. & J.* 391, where this Court say, "where there is no previously existing debt or other liability, but the promise of one, is the inducement to, and ground of, the credit given to another, by which a debt or liability is created in him to whom the credit is given, such a promise is a collateral undertaking. The general rule being, that wherever the party undertaken for, is originally liable upon the same contract, the promise to answer for that liability is a collateral promise, and must be in writing, as if B gives credit to C, for goods sold and delivered to him, on the promise of A to see him paid, or to pay him for them if C should not, in that case it is the immediate debt of C, for which an action will lie against him, and the promise of A is a collateral undertaking to pay that debt, he being only as a security. This case is not distinguishable in principle from the one here put, as an example or illustration of the nature and character of a collateral liability; and we think that the * Court below erred in refusing to grant the defendant's

264 second prayer; that there was no evidence of a joint responsibility of Sterling and Conolly, for the payment of the goods sold and delivered to Sterling, Conolly was manifestly a security only, and not originally and jointly liable with Sterling, for the price of the goods sold and delivered.

Judgment reversed.

Motion by appellee for a *procedendo* overruled.

WILLIAM G. HARRISON *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE.—December, 1843.

The Mayor and City Council of Baltimore by their charter, have full power to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of

contagious diseases within the city, and within three miles of the same.

(a)

That Act clothed the corporate authorities within the specified limits, with all the legislative power which the General Assembly could have exerted, and of the degree of necessity for such municipal legislation, the M. and C. C. of B. were the exclusive judges; the means and manner contributory to the end in view, were committed to their sound discretion. (b)

The corporation might impose penalties, or cause the vessel and all persons on board to be taken possession of, and controlled until their disinfection was effected, and impose on the captain, owner or consignee, reimbursement of all expenses incurred, or they might adopt at the same time both those remedies.

Where testimony has been offered, legally sufficient to warrant the jury in finding certain facts enumerated in the plaintiff's prayer, which gave him a right of action, he may upon the hypothesis, that the jury believe the evidence in the cause, and the facts enumerated, require the Court to instruct them that he is entitled to recover to the extent of such right.

In an action to recover the expenses incurred by the Mayor and City Council of Baltimore, in disinfecting and purifying a vessel, persons, and baggage, on board her at the time of her arrival, from the infection of the small-pox, the defendant cannot require the Court to instruct the jury, that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small-pox. By such an instruction the rights of the plaintiff would have been unreasonably and illegally restricted.

If the health officer of the city, on whom the duty of disinfection is imposed by the ordinances of the corporation, in causing expenses to be incurred, acted *bona fide* within the limits of a sound discretion and with reasonable * skill and judgment in this discharge of his official duties, the reasonable expenses thus incurred by him, **265** must be paid by the captain, owner or consignee of the disinfected vessel as declared by the ordinances of the city on such subjects.

The health officer in his disposition of persons on board of an infected ship, under the ordinances of the city, must send the persons laboring under the infectious disease to the hospital, and may also send those on board the same vessel, liable to be affected by it, to the hospital, if in his opinion such course be necessary to prevent the spread of the disease.

And that officer, acting with reasonable skill and judgment, and with a sound and honest discretion in relation to persons not apparently afflicted with the disease, renders the owner, master or consignee, also liable for the reasonable expenses incurred as in other cases.

Where the County Court undertakes of its own motion to add a qualification to a prayer granted at the request of a party, the qualification must be consistent with the original prayer, and not leave it doubtful or difficult to determinate what was the scope or design of the entire instruction. (c)

(a) But this power, ample as it is, does not authorize the exercise of an unlimited control over the trades and business occupations of the people. *State vs. Mott*, 61 Md. 304.

(b) Approved in *Baltimore vs. Radecke*, 49 Md. 228.

(c) Cited in *Keener vs. Harrod*, 2 Md. 74; *Higgins vs. Carlton*, 28 Md. 139.

Upon motion of the defendant, the County Court instructed the jury, "that if they find the expenses incurred and claimed in this action were not necessary to preserve the health of the city, and not necessary to prevent the introduction of the small-pox by or through the instrumentality of the vessel, the persons, baggage, or articles on board her," then the plaintiff cannot recover; and then added, "that the recovery must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of said disease, and to prevent their propagating the same. *Held*, that this was erroneous, because difficult to reconcile the two parts of the instruction so given, or to discover what was the instruction the Court designed to give.

APPEAL from Baltimore County Court. This was an action of assumpsit, commenced on the 1st January, 1841, in which the plaintiff, the appellees, averred that the defendant in this action on, &c., at, &c., was indebted to plaintiffs in a large sum of money, to wit, the sum of one thousand dollars, lawful money, for so much money by the plaintiffs before that time paid, laid out and expended for the defendant, as consignee of the ship *Ellen Brooks*, at his special instance and request; and being so indebted, &c.

The defendant pleaded *non assumpsit*, on which plea the issue was made up.

At the trial of this cause, the plaintiff to support the issue on its part, offered in evidence and read to the jury ordinance No. 12, entitled an ordinance for the due performance of * quarantine at the **266** port of Baltimore. The plaintiff further proved by Dr. Martin, that he was the health officer of the port of Baltimore, duly appointed in the year 1840, and at the time the *Ellen Brooks* arrived at Baltimore, and during all that year; that the ship *Ellen Brooks* arrived at the port of Baltimore about the 20th of May, 1840; that immediately on her arrival, and coming to at the quarantine ground, he the said Dr. Martin, as health officer, went on board the said *Ellen Brooks*, and there found a number of passengers, say about one hundred and eighty; that some of the passengers were then afflicted with the small-pox, and some of them with typhus or jail fever, and that they continued to sicken after the arrival of the vessel almost daily, some with one disease, some with the other; that the passengers were most of them Irish emigrants, who were living almost entirely on potatoes; that he, the said Dr. Martin, directed the said vessel to remain at the quarantine ground, which is within the limits of the City of Baltimore, and that the persons on board of her should not land, or have any communication with the shore; that he, the said Dr. Martin, directed about twenty-four of the said passengers, being all of them who were sick, to be sent to the small-pox hospital in the City of Baltimore, about one-half of whom, according to his recollection, when sent to the small-pox hospital, were afflicted with the small-pox disease, and one-half with the typhus fever; that he, the said Dr. Martin, considering that the passengers who remained on

board the said vessel, ought to be furnished with fresh provisions, procured such provisions and supplied the said passengers with the same, by whom they were consumed; that the bill headed—

"Ship Ellen Brooks, William G. Harrison, consignee, to the Mayor and City Council of Baltimore, Dr.

For the following articles furnished, and expenses incurred, in disinfecting and purifying said vessel, when at quarantine, in the months of May and June, 1840, on her arrival from Liverpool, viz :

* 1840, June 12, Paid John Muckleroy for beef and vegetables.....	\$35 14	267
" 14, " Philip Fell, for provisions.....	6 00	
" " " D. Graves & Son, for 100 her-rings.....	1 00	
" " " Mr. McAliston, for groceries....	9 00	
" 15, " For lime to whitewash ship....	1 75	
" " " Cartage sundry times.....	1 50	
" " " Boat hire.....	1 25	
" " " John McWilliams, his bill for provisions furnished ship....	11 76	
" " " Hack hire going to and from hospital.....	2 00	
" " " For brooms and brushes for ship's use.....	1 00	
" " " Thos. Evans, for conveying 24 passengers to the hospital.	24 00	
" " " Mr. Bruehl, for bread.....	14 00	

\$108 40

Sworn to by Joseph Martin, on this 30th day of November, 1840, before me, SAMUEL BRADY, Mayor.

Received November 30th, 1840, of the Commissioners of Health, the amount of the above account in full. JOSEPH MARTIN.

Shows the amount in full expended by him, in the purchase of the aforesaid provisions, as well as the other expenditures incurred by him in relation to the said vessel, and the time of payment of the said bill by him; that in the opinion and judgment of the said Dr. Martin, the said expenditures were necessary, reasonable and proper; and that it was necessary in his judgment and opinion, to the preservation of the health of the said passengers, who remained on board the said vessel, that they should be supplied with fresh provisions; that he considered it necessary to prevent the spread of the typhus fever among the said passengers; that they should be furnished with fresh provisions; that his object chiefly in furnishing these provisions, was to prevent the spread of the typhus fever; but that in his opinion and judgment there was still danger that the small-pox might break out among the passengers left on board, after the removal of the persons who were sent as

aforesaid, to the small-pox hospital, and he considered it necessary to prevent the propagation of the small-pox among the said passengers who remained on board the said vessel, to furnish them with fresh provisions, and that he would have furnished said supplies if there had been no typhus; that he, the said Dr. Martin, considered it his duty, as health officer, to send the aforesaid persons to the hospital, and to furnish those who remained on board the said vessel with fresh provisions; that supposing that the master of the vessel might furnish the said provisions at a less expense than he could, he directed the master of the *Ellen Brooks*, to furnish the passengers remaining on board the said vessel with fresh provisions before witness ordered said supplies; that the master refused to do so, saying that he had lost enough already; that he, in company with the Mayor, went to see defendant, believing him to be consignee, and on his way to defendant's counting-room, he met the defendant on Pratt Street in the City of Baltimore, and spoke to him of the necessity of furnishing fresh provisions for the said passengers; that he was then accompanied by Sheppard C. Leakin, the then Mayor of the City of Baltimore; that the defendant then told him to furnish the necessary supplies, and that he would be responsible for them; that in this interview he explained to the defendant, that he was the health officer, and that the passengers were detained on board by his authority; that in this conversation he spoke to the defendant only in reference to the expenses he was incurring, and not in reference to the bill of the small-pox hospital; that he, the said Dr. Martin, would have supplied the said provisions, with or without the consent of the defendant, or any one else, and that his object in calling on the defendant was, to let those interested know what he was doing, was necessary to be done, and that he considered it his duty, as health officer, to furnish these supplies, and that he called on the defendant to give him an opportunity to furnish the provisions, if he could do so at a cheaper rate than he, Dr. Martin could; that when he saw the defendant, nearly all the passengers who were sent to the

269 * small-pox hospital, had been removed to that place; that the said Dr. Martin considered that the change in the provisions so made by him, as necessary to prevent the spread of the small-pox among the passengers, remaining at that time on board the said vessel; that he directed that none of the passengers remaining on board the said vessel, should land; that in the opinion and judgment of the said Dr. Martin, while the said vessel remained at the quarantine ground, there was no danger, that the contagion of the small-pox would be introduced into the City of Baltimore, unless some of the passengers went on shore, or had intercourse with persons from the shore; that he purchased lime, and with it white-washed the *Ellen Brooks*, and fumigated the vessel, and employed no disinfecting agents with respect to the clothes and other articles on board the said vessel, except soap and water and ventilation.

Witness stated that he considered it necessary to send the typhus patients from on board the vessel, as the state of the ship very much increased their danger, and could send them no where else than to the hospital, without danger of communicating the small-pox. The plaintiff further proved by one Jones, that he was a resident student, and had charge of the city contagion hospital in 1840; that the persons named in the bill headed—

"Ship Ellen Brooks, to the City Contagion Hospital, Dr.

To board, medical attention, medicines, nursing, washing, &c.. &c., of the following persons, (vide Dr. Martin's order,) viz:

Date of Ad'm.	Names.	Date of Dis'ge.	No. days.
May 27,	Cornelius Simpson.	June 24,	29, &c.,

enumerating 26 persons, and making in all 694 days, at \$1 per day, \$694. Approved, S. C. Leakin, Mayor.

J. H. MILLER, *Pres. of Faculty.*"

Received payment of the Commissioners of Health, as per receipt books. August 26th, 1840. JOEL JONES.

I do hereby certify, that the individuals named in this bill were sent by me to the small-pox hospital, were sent from the ship Ellen Brooks, as necessary to the purification of said ship.

August 25th, 1840.

JOS. MARTIN, *Health Officer.*

* Were received in that hospital according to contract made with the City of Baltimore to receive all patients sent there **270** by the city, and that they were received in consequence of an order from Dr. Martin, the health officer; that about two-thirds of them had small-pox, one case of syphilus, who after arriving at the hospital was attacked with small-pox, and the rest had typhus fever; that they were kept at the hospital during the periods mentioned in the said paper, and that the cost of each day for each patient, charged by the small-pox hospital, was \$1.00 for board, medical treatment, &c.; that the Hibernian Society furnished them with clothes; that after receiving an order from Dr. Martin, and on the 2d or 3d June, he waited on the captain of the vessel who referred him to the defendant, who when applied to, said that the bill of the small-pox hospital would be paid, or that he would see it paid, and in this interview the defendant requested the witness to send the patients out of the hospital as speedily as possible and not to keep them there unnecessarily; that about two weeks afterwards, and before the said persons had been removed from the hospital, he again called on defendant, who said that he has made some arrangement with Captain Conkling, who had made an agreement with him to refer to arbitration the question as to who was responsible for the said bill, and that the patients in the hospital were discharged as soon as they could with safety be, and that the charges in the said bill are usual and customary. The plaintiff further proved, that the Mayor and City Council of Baltimore paid, before the bringing of this suit, the amounts of Dr. Martin's bill, and that of the small-

pox hospital. The defendant then offered in evidence the charter party entered into in Liverpool, and in pursuance of which the voyage from that port to Baltimore was performed, and the said passengers who were removed to the small-pox hospital were transported.

The charter party stipulated, that the vessel "with all convenient speed be made ready, and receive and take on board a full cargo of lawful goods and merchandise, such cargo not to exceed six hundred
271 tons weight, and of which not more than * four hundred tons dead weight articles, with such passengers as may offer, all expenses on the same being paid by the charterers," &c.; "and being so loaded shall therewith proceed to Baltimore, or so near thereunto as she may safely get, and deliver the same, &c., and so end the voyage," &c. The execution of which was admitted.

The plaintiff further proved by Jones, that in his opinion as a physician, the disease of small-pox may break out after it is imbibed in six days, and may not until fourteen, and that the average is nine days, and that it may last in the constitution of the patient two months. The defendant further proved by William H. Conkling, that upon the arrival of the *Ellen Brooks* at Baltimore he entered that portion of the cargo of the said vessel which consisted of salt, and which belonged to and was shipped on board the said vessel at Liverpool by Ingleby & Browne, the charterers; that this portion of the cargo was consigned to order, and the bills of lading for it had been sent to the said William H. Conkling by a Mr. Baldwin of Philadelphia, to whom Ingleby & Browne had transmitted them, the said Conkling deriving all his authority to act from Baldwin; that when he applied to have the salt landed the captain of the vessel refused to suffer it to be landed until he was secured the full amount of his freight; that he, the said William H. Conkling, at the request of the master and the defendant, undertook to collect the freight payable by the consignees of the other portions of the cargo; did in fact collect it, and paid to the defendant the entire freight under the charter party; that he had no other connexion with the vessel or cargo than as above stated.

Upon cross examination the said William H. Conkling stated, that before the *Ellen Brooks* arrived at Baltimore, he heard the defendant say, that he would want to sell or freight her upon her arrival, and that he had acted on former occasions as the agent in Baltimore of Mr. Sheppard, of New Orleans, the owner of the *Ellen Brooks*, and had been the consignee on former voyages of that vessel, and that he acted as consignee of the vessel when she was in Baltimore at the time of incurring these expenses. The defendant
272 further proved, that the *Ellen* * *Brooks* is an American vessel, owned by Mr. Sheppard of New Orleans, and was entered at the custom house at the port of Baltimore, upon the oath of the master of the vessel, as to the character of the vessel. The defend-

ant also read to the jury ordinance No. 11, entitled "an ordinance to preserve the health of the City of Baltimore." The plaintiff then offered the two following prayers and instructions to the jury:

1. If the jury believe from the evidence in the cause, that the ship *Ellen Brooks* came to at the quarantine ground of the port of Baltimore, with persons on board afflicted with the small-pox, or varioloid or both diseases, at the time spoken of in the testimony, and that the expenses charged in the several bills referred to in the testimony, were incurred in the process of disinfecting the said ship, and in the measures directed to be taken in reference to the officers, crew and passengers, to disinfect them, and to prevent their propagating the said disease, by the officer of the City of Baltimore, authorized to act on such occasions, to wit, the health officer or his assistant; and if they shall believe, that the said expenses have been paid to the parties incurring them, in the first instance by the plaintiffs, and that the defendant was the consignee of the said ship at the time referred to, then the plaintiff has a right to recover from defendant, so much of said expenses as are reasonable and fair of their kind."

2. If the jury believe from the evidence, the facts set forth in the first prayer, that the plaintiffs have a right to recover, notwithstanding the charter party exhibited in evidence. To the granting of which prayers, or either of them, the defendant objected, but the Court [PURVIANCE, A. J.,] overruled their objection, and granted each of the said prayers. The defendant excepted.

2d Exception. The evidence having been given as stated in the defendant's first bill of exceptions, the defendant prayed the Court to instruct the jury as follows:

1. If the jury find the expenses incurred and claimed in this action were not necessary to preserve the health of the City of Baltimore, and were not necessary to prevent the intrpduction * of small-pox into the said city, by or through the instrumentality of **273** the *Ellen Brooks*, the persons, baggage or articles on board of her, then the plaintiff cannot recover, and the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of small-pox.

2. That under the true construction of the ordinance, the expenses which can be recovered, are those incurred in disinfecting and purifying the *Ellen Brooks*, the persons, baggage and articles on board of her at the time of her arrival at the port of Baltimore, from the infection of the small-pox, and the jury can render a verdict only for such amounts as were properly incurred, in such disinfection and purification from the infection of small-pox, of the said vessel, persons, baggage and other articles.

But the Court [PURVIANCE, A. J.,] refused to grant the said prayers, or either of them, as they stand, but did grant them with the following modification, and instructed the jury as follows:

The qualification of the said first prayer of the defendant, was, to strike out all of it, after the word "recovery," and insert, "must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same."

And the qualification of the second prayer was, to strike out all of it, after the word "amounts," and insert the following—"as in the opinion of the health officer were necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same."

To which refusal to grant the said prayers, and each of them as they were presented, and to which granting of the said prayers, and each of them with the said qualifications, the defendant excepted.

3rd Exception. The evidence having been given as stated in the defendant's first bill of exceptions, the defendant then prayed the Court as follows :

274 * 3. That under the true construction of the ordinance in question, the health officer had no power to send to the small-pox hospital, any but those persons who, when sent, were affected with the small-pox or varioloid disease, and that no expense incurred from the sending of any other persons, can be recovered in this action.

4. That if the jury find, that the health officer required the captain of the *Ellen Brooks* to furnish fresh provisions for such persons as remained on board the *Ellen Brooks*, and were not removed to the small-pox hospital, and did this with a view to prevent the spread of disease, then the remedy for the violation of such requisition, if any, was under the 8th section of the ordinance, against the captain of this vessel, and the fact that the health officer did furnish the provisions in question, does not authorize the recovery of the amount so furnished in this action.

5. That the expense incurred and paid by the health officer, under the 7th section of the ordinance, could only be collected from the party charged by him, and if such charge was made in this case in the first instance, against the captain of the *Ellen Brooks*, then it ought to have been collected from him, and there having been no effort made to recover this amount from the captain, there was no obligation on the part of the city to pay it, and such payment was therefore voluntary, and does not entitle the city to recover in this action.

6. That the Mayor and City Council of Baltimore, have full power to provide by ordinance for the preservation of the health of the city, and to prevent the introduction of contagious diseases, but this power does not confer any right on the corporation to impose upon the owner, captain or consignee of a vessel arriving at the port of Baltimore, the expense of curing all passengers arriving in their vessels at that port, nor the expense of providing them with such

provisions as the health officer of that port may order for their use, in a case where the charterers of the vessels have undertaken to provide for all expenses of passengers, and that there can be no recovery in this action, for the amount paid for curing the passengers in * the small-pox hospital, or the amount paid for furnishing provisions by the health officer. **275**

7. That under the true construction of the ordinance, the expenses which can be recovered from the owner, consignee or master, are confined to the disinfecting and purifying the vessel and baggage and articles on board of the vessel, and does not extend to the support and cure of the passengers, who were removed to the small-pox hospital, nor to the provisions furnished by the health officer for the use of the passengers who remained on board of the vessel.

8. If the jury find that the Ellen Brooks was chartered in the manner given in evidence, at Liverpool, to perform a voyage to Baltimore, and that the charterers were to pay all expenses of passengers; and further find, that all expenses claimed in this action, arose from the diseases among the passengers on board the said vessel; and further find, that the defendant in this action had no agency in effecting the said charter party, and his control over the said vessel, as consignee, was to take effect from and after the full performance of all the stipulations in the said charter party, and performances of the said voyage, then the defendant is not responsible in this action.

9. If the jury find, that the defendant in this action was the ship's husband, rather than the consignee, and acted as ship's husband, then he is not responsible in this action.

10. If the jury find that some of the passengers who were removed by the order of the health officer to the small-pox hospital, were afflicted with small-pox and some with typhus, or some other diseases different from small-pox or the varioloid disease, there can be no recovery in this action for the expense of removal, board and medical treatment, at the said hospital, incurred on account of the said passengers who were not afflicted with the small-pox, unless the jury find, that such expenses were necessary to disinfect and purify the said passengers from the infection of the small-pox.

11. If the jury find, that the passengers who remained on board said vessel were not sick, and find that the health officer furnished them with fresh provisions, there can be no recovery * on account of the expenses of such provisions, unless the jury **276** find, that such expense was necessary to disinfect and purify them from the infection of the small-pox.

12. There can be no recovery in this action, for any expense incurred on account of any passenger not afflicted at the time of incurring such expense, with the small-pox, or varioloid disease, unless the jury find that such expense was necessary to prevent such pas-

senger from being infected with the small-pox, and that no expense incurred exclusively in curing any passenger of any disease, different from the small-pox or varioloid disease, or in preventing such other disease, can be recovered in this action.

But the plaintiff having objected to the same, the Court [PURVIANCE, A. J.,] rejected all and each of them, and refused to grant any one of them, to which refusal to grant any of them, and to which rejection of all and each of them, the defendant excepted.

The verdict and judgment being against the defendant, he appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and CHAMBERS, JJ.

Geo. M. Gill and *G. L. Dulany*, for the appellant.

Marshall, for the appellees.

DORSEY, J., delivered the opinion of this Court. By the Act of the General Assembly of Maryland, incorporating the Mayor and City Council of Baltimore, it is enacted, "that the corporation aforesaid shall have full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the City, prevent and remove nuisances; to prevent the introduction of contagious diseases within the city, and within three miles of the same." The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the
277 * legislative powers which the General Assembly could have exerted. Of the degree of necessity for such municipal legislation, the Mayor and City Council of Baltimore were the exclusive judges. To their sound discretion was committed the selection of the means, and manner (contributory to the end) of exercising the powers, which they might deem requisite to the accomplishment of the objects of which they were made the guardians. "To prevent the introduction of contagious diseases within the city, and within three miles of the same," they might impose heavy penalties on the captain, owner or consignee of any ship or other vessel entering the port of Baltimore, on board of which the small-pox or other contagious disease might prevail; or they might seek the accomplishment of their object by causing the vessel and all persons on board to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner or consignee the payment or re-imbursement of all the expenses incurred by such proceedings; or they might adopt at the same time both the suggested remedies, if for the successful and faithful execution of their powers, they deemed it necessary to do so.

With this view of their powers, let us see what laws or ordinances have been passed by the Mayor and City Council of Baltimore in relation to the case now before us. By No. 12 of the Revised Ordinances, page 47, they have provided for the appointment of a "health officer," and prescribed his duties and powers; and by the sixth section thereof, it is enacted, "that the health officer or his assistant shall visit all vessels that may come to at the quarantine ground, as directed in the fifth section of this ordinance, as soon as practicable, in daylight, after the knowledge of such fact shall have been, by any means, obtained by him; and said officer is hereby authorized and directed to send all persons afflicted with the small-pox or varioloid disease, who may be found on board such vessel, to the small-pox hospital, until a receptacle for small-pox patients be provided at the Lazaretto; to take or direct such measures in regard to the officers, crew and passengers, as in * his opinion 278 may be necessary to disinfect them and to prevent their propagating the disease." And by the seventh section of the ordinance, it is enacted, "that the expenses which may be incurred in the disinfecting and purifying of such vessels, persons, baggage or other articles from the infection of small-pox, as provided for in the sixth section of this ordinance, shall be done at the proper costs and charges of the commander, captain, owner or consignee of the vessel infected; and such part thereof as may be necessary for the health officer to incur in the first instance, shall be charged to the commander, captain, owner or consignee, or either of them, in the discretion of the health officer, and collected by him, but if it cannot be so collected, the amount which he shall have necessarily expended, for the purpose aforesaid, shall be refunded or repaid by the register of the city, with the approbation of the mayor."

With this outline of the powers and duties of the Mayor and City Council of Baltimore and the health officer, we now proceed to examine the several prayers and instructions given and refused by the Court to the jury, which by the bills of exceptions taken in the cause are brought up to be reviewed in this Court.

In granting the plaintiff's first prayer in the first bill of exceptions, and overruling the defendant's objection thereto, we think the County Court committed no error. Of all the facts submitted in that prayer to the finding of the jury, there had been testimony offered, legally sufficient, to have warranted such finding. And if those facts were found, the plaintiff's right to recover to the extent claimed by his prayer, followed as the natural and legal consequence.

We think the Court below were also right in granting the plaintiff's second prayer and overruling the objection made to it by the defendant. The Mayor and City Council of Baltimore had the power, as they have done, to visit the penalty for the introduction of a contagious disorder within the limits prescribed by the Act of Assembly,

on the owner, the captain, or consignee of the vessel. Of the character of the vessel, they * are not presumed to have had knowledge. And if they had, what has he to do with a contagious disorder prevailing amongst the crew? And even conceding he were responsible therefor, could the salutary power, vested in the corporation in this respect, be effectuated, by making him only answerable who, perhaps never was and never would be within the reach of the process of our judicial tribunals, and might be a resident, if any settled residence he had, of the most remote portion of the commercial world.

We concur with the County Court in the propriety of its rejection of the appellant's two prayers in his second bill of exceptions. The first part of the first prayer having been granted. Whether the Court were right or wrong in doing so on this appeal, it is unnecessary for us to inquire. But the second part of that prayer, and which was refused by the Court, was, that the recovery of the plaintiffs "must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of small-pox." By granting this instruction the rights of the plaintiffs would have been unreasonably and illegally restricted. It limited the right of recovery, not only to expenses, incurred in the soundest exercise of economical discretion, and of the greatest professional skill and judgment, by the health officer, but it deprived them of the right of recovery thereof, if the jury, judging perhaps from results and circumstances, occurring after the authority of the health officer had been thus exerted, should be of opinion, that the expenses incurred, had not been "absolutely necessary to preserve the health of the city, or to prevent the introduction of small-pox." The right of the plaintiffs to recover is dependent on no such occurrences, is confined to no such restrictions. If the health officer, in causing these expenses to be incurred, acted *bona fide* within the limits of a sound discretion, and with reasonable skill and judgment, in this discharge of his official duties, the reasonable expenses thus incurred must be paid by the defendant. But we think the Court below erred in instructing the jury according to their qualification of the defendant's first prayer. The portion of the prayer 280 * which was retained by the County Court and given to the jury, was, that "if the jury find the expenses incurred and claimed in this action, were not necessary to preserve the health of the City of Baltimore, and were not necessary to prevent the introduction of small-pox into the said city, by or through the instrumentality of the Ellen Brooks, the persons, baggage, or articles on board of her, then the plaintiff cannot recover." With this part of the instruction the defendant surely had no reason to be dissatisfied. It submits, exclusively to the finding of the jury, the question as to the necessity of the expenditures made. Of that necessity they were created the sole judges. But to this instruction the Court appended the follow-

ing modification, viz: "and the recovery must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers, of the said disease, and to prevent their propagating the same." Uniting that portion of the prayer granted, with the Court's modification thereof, we must confess we are much at a loss how to reconcile them, or to discover what was the instruction which the Court designed to give to the jury. Viewing them separately, the meaning of each is obvious enough, but their consistency is not so apparent. By the modification, the jury were told that the plaintiffs' recovery must be limited to such "amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same." Thus making the opinion of the health officer the sole ground upon which the verdict of the jury must be formed; and, in effect, withdrawing from their consideration the expenses which had actually been incurred and the question previously submitted to them, as to the necessity, in point of fact, for incurring those expenditures. And, in truth, instructing the jury to find a verdict for such amount of expenses as in the opinion of the health officer was necessary, although the jury might believe that the health officer, in forming his opinion, had acted *mala fide*, had given countenance to the grossest extravagance, and exorbitance of charges, and had shewn himself destitute of all * professional skill and judgment, and wholly incompetent to make the estimates requisite to the 281 formation of a correct opinion upon the subject. And it is a peculiarity in this instruction, that in that part of it granted at the instance of appellant, it denies to the health officer all right to decide on the necessity of the expenditures to preserve the health of the city, (a necessity of which it may be presumed he was peculiarly competent to determine,) and submitted the determination of that necessity exclusively to the jury; yet in the ascertainment of the amount to be recovered, they were denied the exercise of all discretion and judgment, and were confined "to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo and passengers of the said disease, and to prevent their propagating the same." Notwithstanding it did not appear that he had any particular knowledge of the great portion of those expenses, or that they were incurred under his supervision or management, but on the contrary, that they occurred after he had ceased officially to have any agency in relation to them, and when the patients, or persons infected, were under the care and management of the physicians and nurses of the small-pox hospital; of whom there is no ground for presuming that the health officer was one. Of the amount and necessity of the expenses that accrued at the small-pox hospital, (which form the great bulk of the amount in controversy,) the physicians and nurses thereof possessing actual know-

ledge, were more competent than the health officer to give opinions and testimony as to the necessity thereof, for the purpose for which such expenditures were authorized. The County Court therefore erred in its opinion which excluded such testimony from the consideration of the jury.

The second prayer appears to us to have been properly rejected by the Court, because it called for an instruction to the jury, that no expenses could be recovered, which were not "incurred in disinfecting and purifying the Ellen Brooks, the persons, baggage and articles on board of her at the time of her arrival at the port of Baltimore." Whereas, the ordinance * not only authorizes
282 the health officer "to take or direct such measures in regard to the officers, crew and passengers, as in his opinion may be necessary to disinfect them;" but also "to prevent their propagating the disease." For aught that we can know, one-half the expenses incurred, might have arisen, not from the measures taken by order of the health officer to disinfect or purify the officers, crew and passengers, but "to prevent their propagating the disease." The qualification given by the Court to the second prayer in this exception, is almost identical with the modification made of the first prayer, and is erroneous for the same reasons.

We concur with the County Court in the rejection of the appellant's third prayer, that under the ordinance "the health officer had no power to send to the small-pox hospital any but those persons who, when sent, were affected with the small-pox or varioloid disease, and that no expense incurred from the sending of any other persons, can be recovered in this action." The disposition to be made of persons afflicted with the small-pox or varioloid disease is not left to the discretion of the health officer. The ordinance peremptorily directs them to be sent to the small-pox hospital. But the discharge of this ministerial service is not the only duty imposed on the health officer, by the ordinance, in respect to the persons on board such vessel. He is further required "to take or direct such measures in regard to the officers, crew and passengers, as in his opinion may be necessary to disinfect them, and to prevent their propagating the disease." If then, in pursuing such measures, the health officer, acting with reasonable skill and judgment, and with a sound and honest discretion, had sent others of the crew and passengers, than those afflicted with the small-pox, to the small-pox hospital, we can see no sufficient objection to its being done, or to the recovery of all reasonable expenses incurred in their disinfection and purification, or during their necessary detention for the prevention of their propagation of the small-pox.

The County Court, we think, was obviously right in rejecting the appellant's fourth and fifth prayers in his third bill of exceptions.

*The rejection of the appellant's sixth prayer we also approve of. For although there are parts of this prayer which, **283** if standing alone, the County Court would have granted without the slightest hesitancy, yet they are coupled with other matters, so obviously wrong and inadmissible, that acting on the prayer as an entirety, it was properly refused by the Court.

The seventh prayer was properly refused by the Court below, for reasons assigned by this Court in the previous part of its opinion.

The eighth prayer was rightly rejected, because it called on the Court to leave to the finding of jury certain conditions and qualifications, on which the appellant assumed to act as consignee of the vessel, of which no testimony had been offered.

No proof having been offered, which was legally sufficient to have warranted the jury in finding the fact, that the appellant was the ship's husband, and not the consignee of the vessel, his ninth prayer could not be otherwise than rejected.

The tenth prayer, for reasons stated in previous parts of this opinion, was correctly rejected by the Court.

The rejection of the eleventh prayer also meets our approbation, because, although the expenses incurred for fresh provisions may not have been necessary in the sense in which those terms are used in the ordinance, yet, according to the testimony of the health officer, they may have been necessary to prevent the propagation of the disease.

We concur with the County Court in its rejection of the twelfth prayer. By it the Court were requested to instruct the jury, "that there can be no recovery in this action, for any expense incurred on account of any passenger, not afflicted at the time of incurring such expense, with the small-pox or varioloid disease, unless the jury find that such expense was necessary to prevent such passenger from being infected with the small-pox." This prayer the Court clearly could not have granted consistently with the ordinance, as it would have excluded all allowances for expenses incurred for the disinfection, purification, and necessary detention of the passengers, to prevent the propagation of the contagious disease.

*We concur with the County Court in granting the plaintiffs' prayers in the appellant's first bill of exceptions, and in **284** its rejection of all his prayers in the third bill of exceptions; and we also concur in its rejection of the appellant's two prayers in the second bill of exceptions, but we dissent from the modified instruction given by the Court to the jury under the first prayer, and also from its qualified instruction given under the second prayer, and therefore reverse its judgment.

Judgment reversed, and procedendo awarded.

THE SAVAGE MANUFACTURING COMPANY *vs.* Z. H. WORTHINGTON, Executor of WILLIAM WORTHINGTON.—December, 1843.

Z. sold to W. a tract of land, gave him a bond of conveyance, and received his promissory note signed by him, first in his own name, and secondly as agent for the S. M. Company. The latter was a manufacturing institution, and required land for its operations. The note not being paid, Z. brought his action against both; the company only appeared; the declaration counted upon the note. The proof showed that the agent was the general agent of the company; had bought other land for the use of the company which it retained and paid for, and that the agent was in the habit of signing its notes as agent, which were paid by the company. *Held*, that the bond of conveyance was the only legal evidence of the nature and character of the contract, and that the purchase was made by W. on his own account; and as the company was not authorized to become surety by its charter, the note was a nullity.

Where a note is executed by an agent before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made.

A bond of conveyance which recites that the obligor did sell to the obligee, and contract and agree to grant and convey to him, his heirs and assigns, a certain tract of land, acknowledging the receipt of the cash part of the purchase money from him, with the notes of the obligee, and another for the balance thereof, and stipulating until default should be made in the payment of the purchase money, that he should hold the land sold as aforesaid, demonstrates that the obligee made the purchase on his own account, and parol evidence is not admissible to contradict it in that respect.

Where by the terms of a charter a manufacturing company had no power to assume the responsibility of a surety, the note of such a company executed upon no other consideration than as surety is void. (a)

285 * Parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another.

APPEAL from the Howard District Court of Anne Arundel County. This was an action of assumpsit, commenced on the 17th April, 1840, by the appellee against the appellants and Amos A. Williams. The latter was returned *non est*, &c., and did not appear to the action.

The plaintiff declared, for that whereas the said Amos A. Williams, and the said the Savage Manufacturing Company (by its then agent, Amos A. Williams, in that behalf,) heretofore, to wit, on, &c., at, &c., made their certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, one year after the date thereof, to the said plaintiff, one thousand three hundred and sixty-six dollars and two-thirds of a dollar, with legal interest thereon, for value received by the said Amos A. Wil-

(a) See *Nav. Co. vs. Dandridge*, 8 G. & J. 156.

liams and the Savage Manufacturing Company, the defendants in this action, and then and there delivered the said note to the said plaintiff; by reason of which premises, &c., and being so liable, &c. And also upon the common counts.

The defendant, the S. M. Co., pleaded *non assumpsit*, on which issue was joined.

1st Exception.—The plaintiff in order to prove the issue on his part, offered in evidence the following promissory note, having first proved it to be signed and delivered by Amos A. Williams, as thereby appears.

“SAVAGE, Anne Arundel County, March 11th, 1839.

“\$1,366 $\frac{3}{4}$. One year after date, we promise to pay to Zachariah H. Worthington, executor of William Worthington, deceased, or order, one thousand three hundred and sixty-six dollars, and two-thirds of a dollar, with legal interest thereon, for value received.

“AMOS A. WILLIAMS,

“AMOS A. WILLIAMS,

“Agent for Savage Man'g Co.”

Witness,—John G. Holland.

*To the admissibility of which note in evidence, the defendants by their counsel objected, on the grounds, that it **286** does not sustain, but substantially varies from the declaration, which objection for the reason assigned, the Court, [DORSEY, C. J., WILKINSON and BREWER, A. J.] overruled. The defendants excepted.

2nd Exception.—The plaintiff to support the issue joined on his part, proved by the subscribing witness thereto, the execution and delivery of the above recited promissory note, at the same time declaring his intention in connexion therewith, to offer to the jury, the testimony on his part, hereinafter mentioned and referred to, and therefore read the said note in evidence to the jury. The defendant, by the consent of the counsel and of the Court, reserving his right to object to the admissibility of said note in evidence to the jury, until all evidence in relation thereto had been given to the jury. The plaintiff further proved by a competent witness, that several notes were given him within a few years past, for a considerable sum of money, which were signed in exactly the same manner in which the note sued upon in this cause is signed, and that one of said notes was paid him by the said company, in the year 1840, and that another note was given him for a considerable sum of money, which was drawn in favor of the said the Savage Manufacturing Company, or order, and signed by Amos A. Williams as the drawer, and that this note was endorsed on the back of the same, “A. A. W., agent for S. M. Co.,” and that said note was paid by said company, on or before the year 1840; and that said witness held another note drawn in his favor, by said A. A. W., in his individual capacity; that said witness was in the employment of the company, and had lived at the

place where the works were situated, and had been familiar with the transactions of the said company for many years.

The plaintiff also offered to prove, and did prove by another witness, that a promissory note was signed by A. A. W., for a considerable sum of money, and was drawn in favor of the said the S. M. Co., and made payable to the order of the said *company, **287** which was endorsed in the following manner: "A. A. W., agent for S. M. Co.," and that said note was given to the sister of the witness by said A. A. W., as agent of said company; that he, the last mentioned witness, presented said note for payment to a clerk of said company, and that said clerk said he could not pay the same, until he made inquiries of the said company; that sometime afterwards, said witness called upon the last mentioned clerk, who paid him the interest due on said note, and that said payment was made in the year eighteen hundred and thirty-nine or forty. And the plaintiff for the purpose of further proving the issue in this cause, shewed by yet another witness, that he had in charge a promissory note for a considerable sum of money, drawn and signed by A. A. W., payable to the said the S. M. Co., or order, and that said note was endorsed, A. A. W., agent for S. M. Co., and which note was given to the brother of the witness by the said A. A. W., and that he, (the witness,) presented the same for settlement, and a portion of the same was paid by the said company within a short time past; and also offered evidence to the jury by competent witnesses, who had been debtors to the S. M. Co., that they had severally settled and paid to said A. A. W., as agent of the said company, their respective debts, and taken the receipts of said agent, signed, "A. A. W., agent for S. M. Co.;" and that they had never afterwards been called on by said company or its agents, for the payment of such debts.

The plaintiff also offered proof by a number of witnesses, that A. A. W., who signed this note sued upon, acted as the general agent of the company, at the place where its works are carried on, and that for fifteen or eighteen years, he the said A. A. W., had been considered, and up to the time when this note was given, was considered the general agent of said company, and transacted all their business as such of every kind, done at the place where such company's works are situated. The plaintiff also gave in evidence certain deeds and proceedings in Chancery, which showed a conveyance of land under decree of the Court to the S. M. Co., but as they are **288** only *inducement to certain parol proof, the reporter deems it unnecessary to insert the same. The deeds were dated in 1828, 1837 and 1838, and the decree in 1828.

And the plaintiff further proved, that the said A. A. W., negotiated, as agent of the said company, and purchased the lands mentioned in the said deeds to said company.

The plaintiff also, for the purpose of sustaining the issue on his part, offered in evidence by the subscribing witness to this note, sued on in this case, that he was called upon by the said A. A. W., to negotiate for the purchase of the land for which this note was given; that he (the witness,) applied to the plaintiff and negotiated with him in relation to the purchase of said land, and that said witness was under the impression, when called upon by said W., and during the term of his negotiation, and at the time when he applied to the plaintiff in relation to the same, and is now under the impression, that said land was to be, and has been purchased for the use and benefit of the said company, and that said witness resided for many years at the works of the said company, and in its employment, and was familiar with its transactions; and that the said witness had previously been employed by the said A. A. W., as general agent for said company, to negotiate a purchase of other lands which were since conveyed to and are now held by the company, and the instructions of the witness in this purchase, were exactly similar to those in the former, he understanding at that time (although the name of the company was not used by the said A. A. W. at either,) that he was acting for the company. And the plaintiff further proved by said witness, that the object of purchasing the land of the plaintiff, as stated to witness by A. A. W., was to furnish wood and ore for a furnace, which was built on the lands of the company, which furnace was built by hands that were paid at the store of the company, by orders drawn on A. A. W., as agent of said company, in the same manner as the other hands or laborers of said company were paid. And further, that the said furnace after its erection was carried on for some time by said company.

And the plaintiff for the purpose of further sustaining the issue joined on his part, offered the following extracts from a *book offered in evidence by the defendants, as the minutes **289** of the proceedings of the said company:

“Resolved, That to the agent in town be exclusively confined the financial concerns of the company, to whom alone is given the authority to sign and provide for the obligations of the company, and to attend to its pecuniary arrangements.” And also the following:

Resolved, That Amos A. Williams be appointed general superintendent of the company's affairs at the factory, and from said book it appears that said resolutions were passed on the 3d January, 1842, by the said company. It was further offered in evidence by the plaintiff, that several houses had been erected on the lands of the S. M. Co. between the years 1837 and '39, under the superintendence of said A. A. W. as general agent, and that the iron made at the furnace was used in the company's foundry, and if the said furnace had been in successful operation it would have been of great benefit to the S. M. Co.

The defendants to maintain the issue on their parts, first offered in evidence the Act of incorporation, passed December Session, 1821, chapter 201, and the Act supplementary thereto, passed December Session, 1825, chapter 169, and also gave in evidence the testimony of Thomas C. Miller, a legal competent witness, that he had been storekeeper, agent and a confidential clerk, at the works in this district of said defendants; that their works consisted of a cotton mill, grist mill, saw mill, machine shop, foundry, blacksmith and wheelwright shops, and a country store, of which last he had the special charge; that he had been upwards of fifteen years so employed; that they had also made and sold bricks; that Mr. A. A. W. was during that time general agent of said defendants; his duties were to superintend the above operations of the defendants' works as aforesaid; that while so acting he did sometimes borrow money for the defendants' use, which was repaid; knows that A. A. W. had purchased land for himself; had purchased land of a Miss Dorsey; knows of this, his purchase from Worthington; the Savage Rail Road was made during his employment at the * works; Mr. 290 A. A. W., of his knowledge, borrowed some money of Miss Dorsey for which he gave a note, signed as agent of the defendants; the money was for his own purposes; he, Miller, paid the interest on it without instructions from any one; the town agent instructed him not to pay it, but he paid it on his own responsibility; knows of Holland's claim against the company, the defendants is now in controversy; is upon a note signed by A. A. W., agent S. M. Co.; knows for what the money in said note was borrowed; it was for the Savage Railroad Company; said defendants have no interest in said railroad company; knows that defendants refused to have any thing to do with the furnace; knows that the furnace was not put in operation by the company; it was carried on by A. A. W., C. D. W. and Thomas Landsdale; it was built on the company's land; the hands were paid by A. A. W. at the store, by orders drawn by one Ludd, superintendent of the building, on A. A. W., agent S. M. Co.; A. A. W. also paid at same place the defendants' hands; the defendants had nothing to do with them; business transactions were also done of his at the same place; the hands were paid as other hands were, every two weeks; a separate pay roll for each department of defendants' concerns was made out, containing a list of hands, number of hands, rate of wages of each and total amount, then were added up and transmitted to the agent in town; there never was a pay roll for the furnace, nor was the amount paid its hands ever transmitted to town; the superintendent of the building, Mr. Ludd, drew on A. A. W., agent, orders for the pay; they were never transmitted to the agent in town; no buildings other than the furnace were put on the company's land between the years 1837 and 1840; long before the furnace was put up, in the dry summer months there was a deficiency of the needful supply of water for the use of the cotton mill;

the lands purchased of Snowden were for the possession of Hammond's branch, to be turned into the defendants' stream, which was done accordingly. By the cross examination of John Holland, the plaintiff's first witness, it was proved that since A. A. W's sickness, George Williams, the company's * agent in Baltimore, paid one note for money borrowed of him; refused to pay another which is now in suit; did not know for whom the land was bought that was purchased of Worthington. The defendants also gave in evidence the charter of the Savage Railroad Company, passed December Session, 1834. The defendants also gave in evidence the two books purporting to contain by-laws and minutes of the defendants, after having offered evidence by one of the clerks and one of the corporation, that the said by-laws and minutes, and the parts read in evidence, were the authentic by-laws of said company and minutes, and the following parts and entries were read therefrom:

Extracts from the first book of minutes of the Savage Manufacturing Company:

Baltimore, 26th March, 1824. At a meeting of the S. M. Co. (a quorum being present) it was resolved, That A. A. W., the agent, be and he is hereby authorized to sign and endorse notes on behalf of the S. M. Co., for the purpose of borrowing from the Bank of Baltimore, a sum not exceeding \$12,000, and to that end that he be authorized to use the name and seal or the name of said company, and also to sign or endorse notes for the renewal of such loan, so long as the said bank and company may consent and agree.

Extract from the second book of minutes:

Baltimore, March 5th, 1832. General rules for the Government of the Savage Manufacturing Company:

1st. The agent at the factory shall superintend all the concerns of the company there; he shall collect the rents of the houses, &c. &c.; he shall manage and control the company's store; he shall govern and regulate the farm—and shall superintend the grist mill, saw mill, smith's shop, &c., with power to purchase wheat, beef, hay, corn, &c., necessary for the support of the establishment.

2d. The agent at the factory shall furnish an annual written statement of all the accounts of money received and disbursed by him, and oftener if required by the company, in a plain and * intelligible manner, distinguishing therein the affairs of the rents, the farm, the saw mill, the smith's shop, and the store and grist mill, and shall be and is hereby authorized to employ a clerk in his discretion, and to compensate him accordingly.

6th. At the regular meetings of the company, and at none others, authority may be given for sales and purchases, and for extending improvements or increasing machinery, not hereby delegated to the respective agents. The foregoing rules were unanimously adopted.

Baltimore, October 7th, 1833. At a quarterly meeting, the following resolutions were adopted:

"Resolved, That no further expenditures of any kind shall be made, nor expenses incurred in any department of the company's works, until the whole debt of the company is discharged, except for the conducting of the works in their present condition.

"Resolved, That as soon as the Baltimore and Ohio Railroad Company shall have completed their road nearly to the company's ground a passable wagon road shall be made by the company, so as to intersect the railroad. And the object of this present resolution is expressly declared to be, to negative any views or suggestions tending to the project of making a railroad."

June 8th, 1836. At a special meeting of the stockholders upon the representation of the agent in town, as to the importance of the purchase of a small piece of land, belonging to the estate of the late Thomas Snowden, which is to be sold at auction on the 14th of this month, it was resolved, that the agent at the factory, be and he is hereby authorized to purchase said land at what he may deem it worth.

The defendants also further offered in evidence by the testimony of Joseph Plummer, a competent witness, that John Holland had, in a conversation with him about said controversy with said defendants, said that he had loaned \$500 to A. A. W.; that A. A. W. had paid him by a check on a bank in Baltimore; that subsequently in
293 loaning him other \$500, told him * he had not used the check, returned the check and received a note for \$1,000. Mr. A. A. W. was asked by Holland for security; A. A. W. offered him a mortgage of his lands bought of Dorsey; he said he would take the company (the defendants,) as security; A. A. W. signed the note accordingly as agent for defendants.

The defendants also gave in evidence the testimony of Chas. Marean, a competent witness, who said he had been in the employment of the defendants for six years, from July, 1834, to September, 1841; that he kept all the company's books in town under the direction of George Williams, the town agent; that the defendants never kept a bank account in their name; all bank accounts were kept in the name of George Williams, the town agent; never heard of the note offered in evidence in this suit until Mr. A. A. W. was taken sick; when town agent was sick or absent, he Marean had sole charge of the company's concerns; never knew of any transaction of this kind; had it been a transaction of these defendants, he certainly would have known it; he kept the account of the transactions of the company; accounts were made up of each department once a year; accounts always made up in town; the company kept no bank account; he had nothing to do with A. A. W.'s accounts; A. A. W. drew the money for paying the hands; it was sent out sometimes by Miller or other trustworthy persons; Miller made nearly all the purchases for the store; the furnace was not built by the company; no monies were sent out for that purpose; the money sent out was

to pay defendants' hands; not to put up the furnace; whatever defendant's pay roll required, was sent out; every department's accounts were distinguished and separate; would know if the furnace account had been included; the furnace was complete and in operation a little while; there never was any thing in the accounts that included expenditures for the furnace; each pay list would show its department of manufacturing; no agent for the furnace; no pay roll for it; the iron for the foundry was purchased in town and sent out; he would have remembered any drafts drawn in favor of the furnace.

* On cross-examination of Snowden, he testified that before the purchase of his land, George Williams, the town agent, **294** came out and walked over the property; that he was paid for it by settling his bill and taking cash for balance.

The defendants further to support the issue on their parts, gave in evidence the following bond of conveyance, having on the cross examination of Tristram S. Dorsey, a witness thereto, proved that the same was signed, sealed and delivered by the plaintiff, as thereby appears, to-wit:

"Know all men by these presents, That I, Zachariah H. Worthington, of Montgomery County and State of Maryland, are held and firmly bound unto Amos A. Williams, of Anne Arundel County and State aforesaid, in the full and just sum of eight thousand dollars, lawful money, to be paid to the said Amos A. Williams, or to his certain attorney, executors, administrators or assigns, to the payment whereof, I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this 22d day of April, in the year of our Lord one thousand eight hundred and thirty-nine.

"Whereas the said Zachariah H. Worthington, as executor of the last will and testament of his father, William Worthington, late of Montgomery County aforesaid, deceased, did, on the eleventh day of March, one thousand eight hundred and thirty-nine, pursuant to the power and authority vested in him by the last will and testament aforesaid, sell to the said Amos A. Williams, and contract and agree to grant and convey, or to cause and procure to be granted and conveyed to him, his heirs and assigns, all that part of a tract or parcel of land, lying and being in Anne Arundel County aforesaid, called Thomas and Elizabeth, whereof the above named William Worthington died seized, which is contained within the metes and bounds, courses and distances, following, that is to say, beginning for the same part at a stone planted, &c. In consideration of the sum of \$4,100, one-third part whereof paid by the said A. A. W. to the said Z. H. W. before the execution of this bond, and the remaining two-thirds secured by two promissory notes, dated the aforesaid 11th March, 1839, drawn * by the said A. A. W. and the S. M. Co., **295** to and in favor of the said Z. H. W., as executor of the said

W. W., deceased, or order, for the sum of \$1,366 $\frac{2}{3}$, each one of them payable at one year, and the other at two years after date, which notes bear interest; the receipt and payment of which said sum of \$1,366 $\frac{2}{3}$, and the delivery to him of the two promissory notes above recited or referred to, the obligor in this bond doth hereby acknowledge.

"Now the condition of the foregoing obligation is such, that if upon payment of the residue of the purchase or consideration money, and interest secured by the above recited promissory notes, at the times limited by said notes for the payment of the same, the said Z. H. W. do and shall well and sufficiently grant and convey, or cause and procure to be granted and conveyed unto the said A. A. W., his heirs and assigns forever, the two parts of a tract or parcels of land above described, with the appurtenances, having first procured a ratification of such sale according to law, and that by such deed or deeds of conveyance and assurance in the law, as shall or may be reasonably advised or devised, and required by the said A. A. W., his heirs or assigns, or his or their counsel; and if until such conveyance be made, perfected and delivered, or until default be made in the payment of the residue of the purchase money and interest mentioned, to be secured by the aforesaid promissory notes, or of some part thereof, at the times limited by said notes for the payment of the land, the said A. A. W., his heirs and assigns, be suffered and permitted, peaceably and quietly, to enter into, have, hold and enjoy the parts of a tract of land and premises, so as aforesaid sold and contracted, to be conveyed, with the appurtenances, without any manner of let or hindrance or interruption, of, from or by any person or persons, claiming legally or equitably, any estate or interest therein, or right or title thereto, through, by or under the within named William Worthington; then, and in those events, the foregoing obligation to be void and of no effect, otherwise to be and remain of full force and virtue in law.

ZACHARIAH H. WORTHINGTON, [Seal.]"

296 * It was admitted by the plaintiff and defendants, that the note given in evidence by the plaintiff, is one of the notes referred to in the said bond of conveyance, and that it was given to secure the payment in part of the purchase money for the land therein described.

The S. M. Co., defendants, then moved the Court for their opinion and direction to the jury:

1. That the promissory note offered in evidence by the plaintiff, is not the note of the said Savage Manufacturing Company, and that they are not legal parties thereto.

2. That if the jury find from the evidence that no consideration passed from the plaintiff to the company aforesaid, then the said company are not responsible on the note offered in evidence as aforesaid, unless the jury further find from the evidence, that the said A.

A. W. had authority to bind the company, by signing the said note as the agent thereof, or should find that there was a subsequent ratification or adoption of such signing by the company.

3. That if the jury find from the evidence that the note offered in evidence by the plaintiff, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not bound therefor, the payment thereof, by reason of their legal incapacity to become a security for the fulfillment of the contract of another.

4. That if the jury find from the evidence that the note aforesaid, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not bound for the payment thereof, unless the jury further find, that all the proprietors of stock in said company, by themselves or their authorized agents or guardians, assented to become security for the fulfillment of the said contract of A. A. W.

5. That if the jury find from the evidence that the note offered in evidence as aforesaid, was given to secure the payment of the money therein stated, for a purchase of land made by and on behalf of A. A. W., then the said company are not bound for the payment thereof, unless the jury further find that the proprietors **297** of two-thirds of the stock of said company in value and amount, assented that the said company should become security for the fulfillment of the said contract of A. A. W.

6. That if the jury find from the evidence that the said S. M. Co. was, by Acts of Assembly, authorized to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said Acts, and were also authorized by said Acts, to appoint officers and agents in the prosecution of these objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such purchases, operations and appointments did not authorize the said A. A. W. to bind the said company to the payment of the sum specified in the promissory note, which has been offered in evidence in this case; provided the jury shall further find that the whole and only consideration of said note was land sold, or intended to be sold by the plaintiff to the said A. A. W., and that the plaintiff took said note from him, with knowledge that the same was intended as in payment, or in part payment, or as a security for the payment in whole or in part of the purchase money for such land.

7. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorized to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said Acts, and were also authorized by said Acts, to appoint officers and agents in the prosecution of these objects; and further find that the said company did hold lands and other prop-

erty, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such operations, purchases and appointment did not authorize the said A. A. W. to bind the said company to the payment of the sum specified in the promissory note, which has been offered in evidence in this case; provided the jury shall further find that the whole and only consideration of said note was land sold, or intended to be * sold by the plaintiff to the said A. A. W., and that the plaintiff took said note from him, with knowledge that the same was intended as in payment, or in part payment, or as a security for the payment in whole or in part for the purchase money for said land, unless the jury further find that the said A. A. W. was specially authorized by the said company to bind them by acts beyond the scope of his general agency, in the particular business carried on by the company, or should find that there was a subsequent adoption or ratification of such acts by the said company.

298 8. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorized to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said Acts, and were also authorized by said Acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold land and other property, useful and convenient for their purposes, and did appoint A. A. W. an agent to superintend their operations; that such purchases, operations and appointment did not authorize the said A. A. W. to purchase lands for the company, without their special authority, either previously given or subsequently ratified or adopted.

9. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorized to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in said Acts, and were authorized by said Acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W. an agent to superintend their operations; that such purchases, operations and appointment did not authorize the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently ratified or adopted.

10. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorized to purchase and hold * real estate and other property, for the purpose of carrying on manufacturing, as set out in said Acts, and were also authorized by said Acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold land and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such

operations, purchases and appointment did not authorize the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently ratified or adopted, and that there is no evidence in this case of any such special authority.

11. That if the jury find from the evidence that the S. M. Co. was, by Acts of Assembly, authorized to purchase and hold real estate and other property, for the purpose of carrying on manufacturing, as set out in such Acts; and were also authorized by such Acts, to appoint officers and agents in the prosecution of those objects; and further find that the said company did hold lands and other property, useful and convenient for their purposes, and did appoint A. A. W., as agent to superintend their operations; that such purchases, operations and appointment did not authorize the said A. A. W. to purchase lands on his own account, and bind the company as his security, for the payment of the purchase money, without their special authority, either previously given or subsequently adopted and ratified, and that there is no evidence in this case of any such special authority, nor any evidence from which such authority can be legally inferred or implied.

12. That if the jury find from the evidence that A. A. W. was the agent of the company for superintending their operations as manufacturers, the burthen of showing that the said A. A. W. had authority to bind them as a security, for the payment of the sum of money specified in the promissory note, which has been offered in evidence in this case, rests upon the plaintiff.

* 13. That if the jury find from the evidence that the note offered in evidence was given to the plaintiff to secure the **300** payment of a portion of the purchase money, for land sold by the plaintiff to A. A. W., and that the said company had no interest in said purchase, then the plaintiff has no right to recover the amount of such note from the company, although the jury should further find that the said A. A. W. was the agent of the company, superintending those works, grounds and business as manufacturers of cotton goods, carrying on other concerns auxiliary thereto.

14. That by the Act incorporating the said Manufacturing Company, the objects of such incorporation is declared to be the manufacturing and vending cotton goods, and the carrying on of any other branches of manufactures in their discretion; and the said A. A. W. being shewn by the evidence to be their agent, that unless otherwise proved, his agency is limited to the business of the company, connected with or relating to the objects aforesaid.

15. That the contract for the land to secure the payment of the purchase money, of which the note offered in evidence was given, was the individual contract of A. A. W., and not the contract of the defendants, because the bond of conveyance executed by plaintiff

for said land, is the only legal evidence of the character of said contract.

And the Court, [DORSEY, C. J., WILKINSON and BREWER, A. J.,] gave the directions as asked in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fourteenth prayers, but refused the instructions asked for in the first, twelfth and fifteenth prayers. To which refusal of the Court the defendants excepted.

The verdict and judgment being against the defendants, they appealed to this Court.

The cause was argued before STEPHEN, CHAMBERS, and SPENCE, JJ.

Williams and *W. Schley*, for the appellants. *R. I. Bowie*, for the appellees.

301 * STEPHEN, J., delivered the opinion of this Court. We think there was error in the opinion of the Court in this first bill of exceptions. The principle appears to be well settled, that where a note is executed by an agent, before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made. Speaking of the action of assumpsit on promissory notes, *Roscoe*, in his *Treatise on Evidence*, 174, says: "The making of the note will be proved by proving the hand-writing of the defendant, or if made by an agent, by proof of the hand-writing, and authority of such agent."

After it was admitted by both plaintiff and defendant, that the note given in evidence by the plaintiff was one of the notes referred to in the bond of conveyance, and that it was given to secure the payment in part of the purchase money for the land therein described, the defendants prayed the Court to give several instructions to the jury, all of which were granted except the first, twelfth and fifteenth prayers; for the refusal to grant which, the defendants excepted.

It seemed to be conceded by the counsel for the appellants in the course of the argument, that the Court below were right in refusing the twelfth prayer, it is therefore only necessary to decide upon the propriety of rejecting the first and fifteenth.

The first prayer was, that the promissory note offered in evidence by the plaintiff, was not the note of the said Savage Manufacturing Company, and that they were not legal parties thereto. This prayer we think the Court ought to have granted. It appears by the bond of conveyance, (the execution of which was admitted by the parties,) that the purchase was made by *Williams*, on his own account. The conveyance was to be made to him and his heirs, and there is an express stipulation that he and his heirs shall quietly and peaceably enjoy the property purchased, without any hindrance by the said obligor, or any person claiming under him. The purchase,

therefore, being made by him on his own account, and the note being given to secure the payment of the purchase money, the note was invalid and a nullity, so far as the appellants were attempted
 * to be bound thereby. It being conceded, that by the terms **302**
 of their charter, they had no power to assume such a responsibility.

The fifteenth prayer, we think, also ought to have been granted. The bond of conveyance was the only legal evidence of the nature and character of the contract, and it demonstrated that Williams, and not the company, was the purchaser of the land therein specified. Parol evidence was not admissible to vary or contradict it in that respect, as seems to be clear upon authority. See *Ros. Ev. J.* 9, and 12 *John. Rep.* 77, where it is said, that parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another. See also same book, page 488, where it is said, "that parol evidence is inadmissible to show that a lease executed in the name of, and reserving a rent to one person, was intended for the benefit of another."

For these reasons we are of opinion that the judgment of the Court below was erroneous, and ought to be reversed.

Judgment reversed.

RICHARD R. WATERS and others *vs.* THE STATE OF MARYLAND.
 December, 1843.

The collector of taxes is regarded as an agent of the State, and where he admits the collection of taxes, he will not be heard to urge in his defence to a suit for their recovery, that the money he had received was on account of taxes which the Legislature had no constitutional power to impose.

The question of constitutional authority to levy a tax, may arise between the collector and the person taxed, before payment, or after payment between the State and such person. (a)

By the Act of 1831, ch. 281, a board of managers was provided for, to remove free negroes and mulattoes from Maryland to Liberia. The treasurer was directed to pay them certain sums of money for the objects of their appointment, which he was authorized to borrow on behalf of the State. The 8th section of the Act declared, that for the purpose of raising a fund to pay the principal and interest of the loans aforesaid, the levy Courts, &c. were authorized annually to levy on the assessable property within their respective counties, clear of the expense of collection severally, as follows: * on Montgomery County the sum **303**
 of \$340.66, and so on each of the counties the specific sum mentioned in the Act as to each, which said sums shall be collected in the same manner and by the same collectors as the county charges are collected, the levy Court, &c. taking bond with sufficient security from each collector for the faithful collection and payment of the money in

(a) Approved in *O'Neal vs. Board, &c.* 27 Md. 240; *State vs. R. R. Co.* 34 Md. 365.

the treasury at the time of paying other public moneys, to and for the use of the State. **HELD:**

1st. That this tax was not laid for the support of government, but with a political view for the good government and benefit of the community, which is apparent from its provisions, and the general course of legislation on this subject.

2nd. That as the Act required another bond to be given, payable to the treasury, the Legislature never looked to the bond given under the Act of 1794, ch. 53, as furnishing any security for the collection of the tax imposed by the Act of 1831, ch. 281.

3rd. The collector's bond taken under, and in view of the Act of 1794, ch. 53, is not responsible for the tax of 1831, ch. 281.

Before a law imposing a tax of a specific sum on each county, for the support of government, can be considered as violating the 13th section of Bill of Rights, it ought to appear clearly, that the persons taxable are not made to contribute according to their actual worth in real and personal property.

In the absence of evidence, this Court is bound to presume, that such a tax was laid according to the provisions of the Constitution, and that the Legislature may have divided it among the counties, according to the valuation of property in such local jurisdictions, and had such evidence before them as guided their judgment in that particular.

Contracts between collectors of public money and their securities with the Government, must be construed in reference to the terms used in them. and by the laws under which they were made.

APPEAL from Montgomery County Court. This was an action of debt, commenced on the 11th May, 1838, by the State against the appellants, on their bond, dated 25th September, 1835, subject to the following condition :

"The condition of the above obligations is such that if the above bound Richard R. Waters, do and shall well and faithfully execute his office as collector of Montgomery County, and the several duties required of him by law, and shall well and truly account for and pay to the justices of the Levy Court, or their order, the several sums of money which he shall receive and be answerable for by law, at such times as the law shall direct, then the above obligation to be void and of none effect, else to be and remain in full force and virtue in law."

304 * The defendants, after craving oyer of the bond and condition, pleaded general performance by the said Richard R. Waters to the declaration of the State.

The State replied, that by an Act of the General Assembly of the said State, passed at a Session of Assembly, begun and held at the City of Annapolis, on Monday, the 20th day of December, 1831, and ended on Wednesday, the 14th day of March, 1832, entitled, "an Act relating to people of color in this State," it was, amongst other things, enacted, that for the purpose of raising a fund to pay the principal and interest of the loans authorized and required by said Act, the Levy Courts or commissioners of the several counties of this

State, were thereby authorized annually, during the continuance of the said Act, to levy on the assessable property within their respective counties, clear of the expense of collection severally, the several sums of money in said Act mentioned, and particularly on Montgomery County, the sum of \$340.66, which said amount or sum of \$340.66 was directed by said Act to be collected annually in the same manner, and by the same collector, as county charges were collected; and the said State, by its said attorney, further saith, that by an Act of the General Assembly of the said State, passed at a Session of Assembly, begun and held at the City of Annapolis, on Monday, the 29th day of December, 1834, and ended on Saturday, the 21st day of March, 1835, entitled, "an Act to provide more effectually for the levy and collection of the tax imposed for the purpose of colonizing the free people of color of this State, by an Act, entitled, an Act relating to people of color in this State, passed at December Session, 1831, ch. 281," it was, amongst other things, enacted, that it should be, and was thereby made the absolute duty of the Levy Court or commissioners of the county, as the case may be, of the several counties of this State, to levy on the assessable property within their several and respective counties, during the continuance of the Act of December Session, 1831, ch. 281, the several amounts by the eighth section of the said Act, and the supplements thereto, authorizing to be levied on the assessable property of each of said * counties respectively, and the said Levy Courts and commissioners were thereby absolutely required, fully and in **305** every respect to comply in future with terms, conditions and requirements of the eighth section of the aforesaid Act, or as long as the same shall be and remain in force; and that it should be, and was thereby made the duty of the Levy Court or commissioners of the county of each and every county of this State, in which the said tax shall not have been heretofore regularly and fully levied, to levy when they shall respectively next levy the annual taxes or county levy for the county purposes of each of said respective counties, on the assessable property within each county, with interest respectively, the arrears of said tax then due by each of said counties respectively, agreeably to the provisions of the aforesaid eighth section of the aforesaid Act, and to provide for the collection and payment over of the same to the Treasurer of the Eastern or Western Shore, as the case might be, in the same manner as is prescribed for in the eighth section of the Act aforesaid; and that it should be the duty of the Levy Court or commissioners of the county, as the case might be, of each and every county in this State, to forward to the Treasurer of the Western Shore, within one month after they shall have respectively levied the tax or dues aforesaid, a certificate that the same has been duly levied and placed in the hands of the proper officer for collection, and that it should be the duty of the Treasurer of the Western Shore, and he was thereby authorized and

required, if there should not have been received from the Levy Court or the commissioners of the county as the case might be, of each county in this State, a certificate of the levy of said tax having been made, according to the provisions of the said Act, and of the eighth section of the Act of eighteen hundred and thirty-one, chapter two hundred and eighty-one, entitled, "an Act relating to the people of color of this State," to deduct on or before the first day of December, in each and every year, from that portion of the free school fund which might be payable to the county authorities of any and each county which may have failed to forward such certificates, and in which such tax shall not have been levied, an * amount equal to the

306 amount of said tax which may at the time be in arrears and not levied by each of said counties respectively, so in default and neglecting to comply with the provisions of the said Act, as passed at the session of one thousand eight hundred and thirty-four, and the sum so deducted, the treasurer should, to the ordinary purposes of the treasury, to be reimbursed, however, to the free school fund of each county respectively, whenever the said tax should be thereafter duly levied, collected and paid into the treasury from the county so in default, and subjected to such deduction. And the said State, by its said attorney, in fact saith, that the Levy Court of Montgomery County did not levy on the assessable property within the said county, clear of the expense of collection, the said sum of three hundred and forty dollars and sixty-six cents, for three several years, that is to say, for the years one thousand eight hundred and thirty-two, one thousand eight hundred and thirty-three, and one thousand eight hundred and thirty-four, amounting in the whole to the principal sum of one thousand and twenty-one dollars and ninety-eight cents, clear of interest and the expense of collection; and that the said Act, entitled "an Act relating to the people of color of this State," was during the said several years in full force, and still continues so to be; and that the Levy Court of Montgomery County, did at the first meeting of the said Court, after the enactment of the said Act, passed at December Session one thousand eight hundred and thirty-four, chapter one hundred and ninety-seven, for the purpose of levying the annual taxes of said county, that is to say, on the twenty-second day of September, one thousand eight hundred and thirty-five, did levy on the assessable property of said county, with interest, for each and several year, the arrears of said tax then due from said county, and did provide for the payment and collection of the same to the Treasurer of the Western Shore, according to law, and which arrears of tax, with the interest thereon, so remaining unpaid, and so ordered to be levied, amounted to the sum of one thousand one hundred and forty-four dollars and fifty-eight cents;

307 and the said Levy Court, did at the same time, levy on the * assessable property of said county the further sum of three hundred and forty dollars and sixty cents, due for the year one thousand

and eight hundred and thirty-five, clear of the expense of collection, according to the directions of the Act of Assembly, passed at December Session one thousand eight hundred and thirty-one, entitled "an Act relating to people of color in this State;" and which said several sums of money amounted in the whole to the sum of fourteen hundred and eighty-five dollars and twenty-four cents; and which the said last mentioned sum of money was to be collected and paid by the said Richard, who was then and there collector of the county aforesaid, to the Treasurer of the Western Shore, in the year one thousand eight hundred and thirty five, according to the aforesaid Acts of Assembly, and into whose hands, as collector aforesaid, the same was placed for collection; which said last mentioned sum of money, after the making the writing obligatory aforesaid, by virtue of the Acts of Assembly aforesaid, and his office of collector aforesaid, the said Richard did, in the year one thousand eight hundred and thirty-five, at the county aforesaid, collect and receive, but the same the said Richard hath not rendered or paid, but the same to the said Treasurer of the Western Shore to render or pay, he has altogether refused, and still doth refuse; and this the said State, by its attorney, is ready to verify; wherefore the said State prays, &c.

To this replication the appellants demurred generally, and the Court having thereupon rendered judgment against them, they prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, and CHAMBERS, JJ.

Carter and A. C. Magruder, for the appellants. *Boyle, D. A. G.*, for the State.

ARCHER, J. delivered the opinion of this Court. It is admitted by the demurrer in this case, that the collector has received all the taxes levied on the assessable property of Montgomery County, the non-payment of which furnishes * the subject of this suit.

Having thus admitted the receipt of the money, the collector, **308** who is in the light of an agent of the State, could not be heard to urge in his defence to a suit, that the money he had received, was on account of taxes which the Legislature had no constitutional power to impose. The question of constitutional authority to levy the tax would properly arise between the collector and the person taxed, before payment, or, after payment, between the State and such person.

But supposing that it is entirely competent for all the defendants to urge the unconstitutionality of the law imposing these taxes, we will inquire whether they are obnoxious to the objection.

In the argument of the counsel of the appellant it is contended, that the tax in controversy, is one laid for the support of government. If it were conceded that this was the fact, we should by no

means be prepared to pronounce an opinion against it, as violating the 13th Article of the Bill of Rights. Before such a judgment could be formed, it ought to appear clearly to us, that persons taxable, are not made to contribute according to their actual worth in real and personal property. We should be bound to presume, in the absence of evidence, that the tax imposed by the Act of 1831, ch. 281, was laid according to the provisions of the Constitution. The Legislature may have divided this tax among the counties according to the valuation of property in such local jurisdictions, and we must suppose, in the present state of the record, had such evidence before them as guided their judgment in this particular. There is nothing on the face of the law which indicates, that the Legislature adopted an arbitrary rule in the apportionment of the tax without regard to the constitutional provision on the subject.

But the tax, as we apprehend, has not been laid for the support of government, but with a political view, for the good government and benefit of the community. The Act of 1831, ch. 281, it is true does not declare, that the tax is imposed with a political view, but it is quite apparent from its provisions and the general course of legislation on this subject, that *such was the design of the
309 Legislature. The residence of free negroes in the State, who should thereafter be manumitted, was to be dependent upon evidences of extraordinary good conduct, and if such should not be furnished, provision is made in case of their refusal to emigrate, for their transportation beyond the limits of the State. It thus appears they are treated as a vicious or dangerous population, and to lessen the number, provision is made by the law for the removal of all by their consent, and for the transportation of such as might be thereafter liberated, who refused to go, or did not furnish the evidence required of their character. In the same spirit, laws have been passed to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness. Other laws might be adverted to, for the purpose of shewing the light in which this population has been regarded by the Legislature, but we deem it unnecessary; presuming that enough has been said to lead us to the conclusion, that a law passed for the removal of a population viewed in such a light, has been enacted with a political view.

By the Act of 1794, ch. 53, a bond is required to be taken from the collector of the county charge, the condition of which, as prescribed by the law is as follows:

“That if the above bound ——— shall well and faithfully execute his office, and the several duties required of him by law, and shall well and truly account for and pay to the justices of the Levy Court, or their order, the several sums of money which he shall receive or be accountable for by law, at such time as the law shall direct, then the above obligation shall be void.”

The bond upon which this suit has been instituted, conforms in all respects, to the bond required to be taken by the Act of 1794, ch. 53, the condition of which we have just referred to.

By the Act of 1831, ch. 281, sec. 8, it is declared, that the sums levied on the counties for paying the principal and interest of the sum by that Act directed to be borrowed, for removing the free people of color, shall be collected in the same * manner, and by the same collectors as county charges are collected, and **310** directs bond to be taken with sufficient security from such collector, "for the faithful collection and payment of the money in the treasury of the Eastern and Western Shore, as the case may be, at the time of paying other public moneys to and for the use of the State."

If by the Act of 1831, ch. 281, a bond had not been directed to be taken of the collector, to pay the tax to be collected under its provisions into the treasury, the words of the condition of the bond taken under the Act of 1794, ch. 53, would probably have been sufficient to have entitled the State to a recovery for the taxes now in controversy.

But the contracts of the collectors and their securities, with the government, must be construed in reference to the terms used in such contracts, and by the laws under which they were made. As the law of 1831, ch. 281, has required another bond to be given payable to the treasury, we believe the Legislature never looked to the bond given under the Act of 1794, ch. 53, as furnishing any security for the collection of what is commonly called the colonization tax, directed to be levied by the law of 1831, ch. 281. The parties must, in this view of the law, be considered as not contracting in reference to the latter law, or as contemplating any responsibility for the collection of that tax.

It is also worthy of remark, that the condition of the bonds required to be taken under these laws, demand payment of the sums collected to different officers. By the first, payment is to be made to the justices of the Levy Court, by the latter to the treasurer. From the above considerations, we are satisfied, that no recovery can be had on the bond in suit in this case, for the tax now in controversy.

We presume as the law directs, that a bond has been taken under the Act of 1831, ch. 281, which could alone be sued on. If no such bond has been taken, the State is without remedy against the sureties on this bond.

Judgment reversed.

311 * S. and H. HOWARD *vs.* THE WILMINGTON AND SUSQUEHANNA RAILROAD COMPANY.—December, 1843.

Where the parties entered into a contract, to construct a road between two given points, which from its nature was an entire indivisible contract, and afterwards entered into another agreement for the performance of the same work, either in part, or in the whole, at a different price, the latter is an extinguishment of the first contract.

Where an entire contract is extinguished in part or in the whole, an action on the contract itself cannot be sustained.

Where an entire contract is extinguished in part or in whole, by the making a new one for a part of the subject-matter of the first, it is not sufficient for the plaintiff, who seeks to recover damages for a violation of the original agreement, and to repel the legal presumption of a merger in such a case, to aver that he entered into the second contract with an express understanding on his part, and so declared to the defendant at the time, that the first contract was not waived, except so far as it was covered by the second; but the fact of assent by the other party should have been also averred.

The legal presumption of a merger, as where two contracts are successively entered into upon the same subject-matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating.

Whether parol evidence of such assent would be received to vary the effect of the second contract upon the first, both being in writing. *Quere.*

Where a contract has been vacated and rendered legally inoperative in part by the consent of the plaintiff, no action can be sustained upon it for the recovery of damages on the ground, that the plaintiffs was prevented by the wrongful act of the defendant from fulfilling it.

Where an original contract has been rescinded by the parties after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable with it, in such case a recovery may be had for the performance on a general count; but not by declaring on the contract itself. (a)

It is a rule in pleading, that each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse.

In July, 1836, the plaintiff contracted with the defendant, to construct a railroad according to certain specifications, to complete one mile by the 15th October, and the residue by the 1st of November following. The defendant agreed to pay in monthly payments, according to the measurement and valuation of his engineer, retaining from each payment fifteen per cent. until the final completion of the work, and was authorized in certain cases to declare the contract forfeited, from which the plaintiff should have no appeal. The plaintiff averred, that he diligently prosecuted his work, * &c. until the 17th September, when he was prevented by a writ of injunction, served on him until

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(a) Cited in *Jenkins vs. Long*, 8 Md. 142. See *Watkins vs. Hodges*, 6 H. & J. 87; *Watchman vs. Crook*, 5 G. & J. 155.

the 30th October, from going on; that the engineer of the defendant had not complied with his duty, stating the particulars of his breach thereof under the contract; that he proceeded after the 1st November, under the orders of the defendant to prosecute the work until the 19th January, and that the work done under the agreement in December, 1836, was estimated by defendant's engineers, at, &c. which sum not being paid, the defendant on the 19th January, fraudulently, and for the illegal purpose of imposing better terms on the plaintiff, &c. declared the contract forfeited. The defendant pleaded, that the contingencies (stating them,) on which the right to forfeit the contract depended, had occurred, and that on the 19th January, he had in virtue of his reserved power, forfeited the agreement. To this the plaintiff demurred generally. *Held:*

1. That the breaches of contract, not denied by the plea, were admitted.
2. That the illegal and fraudulent purpose, for which the contract was alleged to have been annulled, was also admitted.
3. That the annulling the contract under the circumstances, was a breach thereof.

Where a contract is broken, the plaintiff will be entitled to some damages, whether they be stated or not.

Damages are implied from a breach of a contract.

Wherever damages necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, to prevent surprise.

Where a breach of contract is relied on, from which damages necessarily and naturally arise, the general conclusion, that the plaintiff has sustained damage in, &c. is sufficient to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them.

APPEAL from Cecil County Court. This was an action of *assumpsit*, commenced on the 21st March, 1837, by the appellants against the appellees.

The plaintiff's declaration contained nine counts.

The defendant pleaded nine pleas, viz:

1st and 2nd plea, *non assumpsit* and payment to all the counts on which issues were joined.

3rd plea was to the 4th count.

4th plea to the 5th count.

5th plea to the 6th count.

6th plea to the 8th count.

7th plea to the 1st count.

8th plea to the 2nd count.

* 9th plea to the 3rd count.

To these seven last pleas, the plaintiffs demurred generally. 313

The County Court overruled the demurrers, and decided the pleas to be sufficient in bar of the action.

At the trial in this Court the parties agreed, that the general counts in the plaintiff's declaration should be abandoned and stricken

therefrom; that the judgment for the defendants should be regarded and treated as a general judgment, and that the case should be argued and heard upon the demurrers to the pleas filed to the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th and 9th counts of the plaintiff's declaration.

The plaintiffs declared as follows:

1st Count.—For that whereas the said plaintiffs heretofore, were employed in executing work and labor upon railroads and canals as their proper business, &c., and whilst they were so employed, to wit, on the 1st October, 1835, at, &c., at the request of the defendants, they the said plaintiffs, did make and enter into a contract or agreement with the said W. and S. R. R. Co., to graduate the W. and S. Railroad between Charlestown and Havre de Grace, for twenty-four cents per cubic yard for excavation, grubbing and purchasing land for embankment across Principio Valley included. The plaintiffs to purchase land to supply material for embankment when it could not be supplied from the road, without making a haul of less than eleven hundred feet; all rock or other material that could not be removed without blasting, to be left to the superintending agent, and if said agent and plaintiffs could not agree as to the price, the agent might re-let this part of the work to any other person, as specified in the former specifications of said company of the first and second divisions. And the said plaintiffs aver, that after the making the contract aforesaid, and in consideration thereof, to wit, on, &c., at, &c., and also in consideration, that the said plaintiffs then and there undertook and faithfully promised the defendants to fulfil, perform and keep the said contracts, all things on said plaintiffs' part to be performed, fulfilled and kept. They the said defendants, under-
314 took and faithfully promised the said plaintiffs to perform, and fulfil * and keep the said contract in all things on defendants' part, to be performed, fulfilled and kept, to wit, on, &c., at, &c. And the said plaintiffs declare, that they have always, since the making of the said contract, been able, ready and willing to perform, fulfill and keep all things in said contract specified on their part to be performed, fulfilled and kept, according to the true intent and meaning of the said contract, of which the said defendants had notice, to wit, &c., and often afterwards at, &c. And the said plaintiffs further say, that in consideration of the contract aforesaid, and of the promises and undertakings of the said defendants aforesaid, and for the purpose of performing all things in said contract on the part of said plaintiffs to be performed, they did advertise, proclaim and publicly declare, that they would employ and hire all such laborers as should apply to said plaintiffs to be hired for a reasonable compensation, to work upon the railroad in the contract stated, between Charlestown and Havre de Grace, in consequence whereof the plaintiffs were applied to by a great number of laborers to be hired, to wit, upon said road, and said plaintiffs did engage, hire, and pay a much larger

number of laborers than they at that time had use for, or could work to advantage on the other job of work they were then engaged in completing, for the purpose of retaining said laborers in plaintiffs' employment, with their carts, oxen and horses, so that the plaintiffs might be ready and prepared to commence and vigorously prosecute to its completion the graduation of the railroad in the agreement specified, whenever the said defendants were ready, and should give notice to the plaintiffs to begin to work upon it; and the said plaintiffs also aver, that they employed a number of boarding masters, to board the laborers to be employed in working on the said railroad in said agreement specified, many of whom purchased and provided large supplies of food, bedding and cooking utensils; and the plaintiffs engaged the services of a number of managers to superintend the work of the laborers, all of whom were retained by the said plaintiffs at great expense, until said defendants were ready for plaintiffs to begin grading the railroad between Charlestown and Havre * de Grace, according to the agreement aforesaid; and the said plaintiffs also purchased a great number of im- **315**plements and engines, and one hundred dozen shovels for the purpose of fulfilling their agreement aforesaid, and were put to great expense, inconvenience, trouble and delay in and about satisfying, retaining and compensating the laborers, workmen and others whom they had engaged, retained and hired, for the purpose of fulfilling their agreement as aforesaid. And said plaintiffs further declare, that a great number of laborers, workmen and others they had engaged and hired for the purpose of fulfilling the agreement aforesaid, moved upon the line of the railroad between Charlestown and the Susquehanna River, and there constructed their houses or shanties, to be ready to commence their labors on said railroad, according to the agreement they had entered into as aforesaid, with the said plaintiffs; and the said plaintiffs moved and transported all their necessary engines, implements, machinery, stores and other effects from the Baltimore and Port Deposit Railroad to French Town in Cecil County, for the purpose of making ready to use the same on that part of the Wilmington and Susquehanna Railroad in said agreement mentioned. And the said plaintiffs say, they were then and there able, ready and willing to commence and prosecute the work in the said agreement mentioned, to its completion, according to said agreement; and said plaintiffs further aver, that they were hindered and prevented by the making of the agreement aforesaid, from attending to and bidding for the lettings and contracts upon other railroads and canals in various other places, which they otherwise might and would have attended to and bid for, and engaged in, and thereby lost the opportunity of making large gains and profits from the same; and the plaintiffs further aver, that although after the time of making the agreement, aforesaid, to wit, on the 12th July, 1836, they entered into another contract or agreement in writ-

ing with said defendants, to do all the grading of that part of section No. 9 of the same railroad, mentioned in the first agreement, and which lies in the State and county aforesaid, and which extends from station No. 191 to the end of the piers and wharf* in the river Susquehanna opposite Havre de Grace, being a portion of the same railroad included in the first agreement above stated. Nevertheless, the said second agreement to grade section No. 9 from station No. 191 to the river as aforesaid, was made and entered into, with the expressed determination and understanding on the part of the plaintiffs, and was so declared and expressed by the plaintiffs to the said defendants, at and before the time of entering into the said second agreement, that by entering into the said second agreement, they the said plaintiffs, did not waive, abandon or rescind the said first agreement so made as aforesaid, but that notwithstanding the said second agreement, the said plaintiffs held and considered the said defendants liable and responsible to them for all the loss, injury and inconvenience the said plaintiffs had suffered or been put to by the non-fulfilment on the part of the said defendants, of all the matters and things in the said first agreement by them to be performed and observed, according to the true intent and meaning of the said first agreement, except only inasmuch as said first agreement refers to that part of the said railroad that is mentioned in said agreement, of all which premises the said defendants had notice, to wit, at, &c. Yet the said plaintiffs say, that the defendants well knowing the premises, but contriving and wrongfully intending, artfully and deceitfully to defraud and injure the said plaintiffs, to wit, on the 1st December, 1835, at, &c., wholly refused and declined to observe, perform and fulfil any of the matters and things in the said first agreement, specified on their part to be performed and fulfilled, and refused and declined to perform any of the matters and things in their said promise and undertaking, but thereby craftily and subtly deceived the said plaintiffs in this, *videlicet*, that the said defendants took the work of grading the railroad in the first agreement mentioned out of the hands of the said plaintiffs, by letting the same to other contractors and persons without the consent of and against the will of said plaintiffs; and said defendants further disregarding the said first agreement, and their promises and undertakings afterwards, to wit, on the 1st of December, 1835, at the county

316 * aforesaid, did not, nor would permit or suffer the plaintiffs to begin or proceed to complete the work on the railroad in the first mentioned agreement specified, and then and there wholly hindered and prevented them from so doing, and then and there wrongfully and unjustly discharged the plaintiffs from any performance or completion of their first said agreement and promise and undertaking, whereby the plaintiffs have been deprived of all the profits, gains and advantages, which they otherwise might, and would have de-

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rived and acquired from the completion of the work in the first agreement mentioned *scilicet* at, &c.

2nd Count.—For that whereas the said plaintiffs were heretofore engaged in executing jobs of work and labor upon railroads and canals as their proper business, &c., and the said W. and S. R. R. Co. were incorporated for the purpose, amongst other things, of constructing a railroad in the county aforesaid, and were bound by their charter to complete the construction of the said railroad in a given time mentioned therein, on pain of forfeiting their franchise, and said company were empowered amongst other things, to enter into contracts with laborers and others, for the purpose of constructing said road, and the said defendants *scilicet* on the 1st of October, 1835, at, &c., in consideration, that the plaintiffs at the special instance and request of the defendants, would undertake, promise and agree to grade all that portion of the W. and S. R. R. that lies betwixt Charlestown and Havre de Grace, or that was there laid out or contemplated to be made there in Cecil County, and would agree to execute the whole in a workmanlike manner, and according to the directions of the engineer, the defendants undertook and promised the plaintiffs, that they would have the privilege of wasting the material of the cut, and of purchasing ground to supply the embankment over Principio Valley when it could not be supplied from the road, without making a haul of less than eleven hundred feet: and the defendant undertook, and then and there promised the said plaintiffs to permit and suffer them to grade the portion of the railroad that lies between Charlestown and the Susquehanna River, * and to pay the said plaintiffs twenty-four cents per cubic yard for 318 common excavation, all rock excavated to be paid for at the estimate of the engineer; and the said plaintiffs aver, that they, confiding in the promise and undertaking of the said defendants, did undertake, promise and agree, to and with said defendants to grade all that portion of the W. and S. R. R. that lies between Charlestown and Havre de Grace in a workmanlike manner, according to the directions of the engineer, afterwards, to wit, on 1st October, 1835, at, &c., on the day and year last aforesaid, and divers times and days thereafter, did provide the necessary laborers, means and instruments for the purpose of grading the road as aforesaid, and were put to great trouble and expense, in and by engaging a great number of superintendents and laborers, and retaining them until the said defendants should be ready for plaintiffs to begin grading said railroad, and by purchasing a great number of shovels and other implements, and by moving and transporting all their necessary implements, machinery and stores from the Baltimore and Port Deposit Railroad to French Town, for the purpose of using them in and about grading that portion of said railroad above mentioned; and the said plaintiffs further aver, that they have been able and willing ever since the making of the said promise and undertaking of the defendants aforesaid, (until

as hereinafter stated they were prevented from so doing by said defendants,) to begin and execute the grading of that portion of said railroad that lies betwixt Charlestown and Havre de Grace, in a workmanlike manner, and according to the directions of the engineer, whereof the said defendants then and there had notice at Cecil County aforesaid. Yet the said defendants not regarding their said promise and undertaking in manner aforesaid made, but contriving and fraudulently intending to deceive and injure the said plaintiffs in this behalf, did not, nor would, permit or suffer the said plaintiffs to begin to grade the said portion of railroad, nor to complete the grading of the same, but wholly refused and neglected so to do, and on the contrary thereof, they the said defendants, after the making of their

319 said promise and undertaking, and whilst the * said plaintiffs were able and willing to begin and execute the grading of that portion of the railroad that lies betwixt Charlestown and Havre de Grace in a workmanlike manner, according to the directions of the engineer, to wit, on the 1st of December, 1835, at, &c., wrongfully and unjustly, and without the license and consent, and against the will of the plaintiffs, they the said defendants, let out the said portion of the railroad, and contracted for its gradation with other persons, and caused it to be graded by them, whereby the said plaintiffs were hindered and prevented from grading or beginning to grade said portion of the railroad aforesaid, nor did the said defendants pay the said plaintiffs twenty-four cents per cubic yard for the common excavation on said portions of railroad nor any part thereof, nor did they pay the said plaintiffs for the rock excavated according to the estimate of the engineer, although often requested so to do, but have hitherto wholly refused and neglected, and still refuse. And the said plaintiffs also aver, that the said defendants wrongfully and unjustly discharged the plaintiffs from the performance or completion of their said promise and undertaking, whereby the said plaintiffs not only lost and were deprived of all the profits, benefits and gains that might and would have accrued to them from grading the said portion of the railroad betwixt Charlestown and the Susquehanna River, but also suffered and were put to great loss and expense of time and money, in and about preparing to execute the grading of said railroad, and prevented from entering into contracts and engagements for jobs of work on other railroads and canals, amounting in the whole to a large sum of money, at, &c.

3rd Count.—And whereas also heretofore, that is to say, on the 1st October, 1835, at, &c., in consideration that the said plaintiffs, at the special instance and request of the defendants, would get ready and be prepared in a reasonable time, then next ensuing the day and year last aforesaid, with laborers, implements, machinery, horses and carts, to grade a certain portion of a railroad, which the defendants were then engaged in constructing, the defendants then and there

undertook, * and faithfully promised the plaintiffs to suffer and permit them to grade all that portion of the W. and S. R. **320** R.; (or by whatever other name the same may be called,) that they were engaged in constructing, or intended to construct betwixt Charlestown and the Susquehanna River, and to give the plaintiffs the privilege of wasting all material of the cut not required for the embankments, and permit them to purchase earth to supply the embankments over Principio Valley, where it could not be supplied from the road without making a haul of less than eleven hundred feet, and if the plaintiffs would execute the whole grading in a workmanlike manner, and according to the directions of the engineer, undertook and promised to pay them twenty-four cents per cubic yard for common excavation, and to pay the plaintiffs for all rock excavated at the estimate of the engineer. And the said plaintiffs aver, that they, confiding in the said promise and undertaking of the defendants, afterwards, at, &c., on, &c., in the county aforesaid, and on divers days and times thereafter, for the purpose of being ready and prepared with laborers, implements, machinery, horses and carts to grade the portion of the said railroad above mentioned, did engage and hire a great number of laborers, and horses and carts, all of which were kept and retained by plaintiffs in a state of readiness and at great expense, waiting for a long space of time for defendants to permit and suffer the plaintiffs to begin the grading of the portion of the railroad above specified, and said plaintiffs purchased a great number of necessary implements and machines, and one hundred dozen shovels, for the purpose of being ready to grade said railroad, and were put to great expense and trouble in and about moving and transporting their engines, machinery and other effects from the Baltimore and Port Deposit Railroad to French Town in Cecil County, for the purpose of being ready and prepared to commence grading the said portion of said railroad above mentioned, and to proceed with the completion of the same in a workmanlike manner, according to the directions of the engineer, so soon as the defendant might or should permit, or suffer the plaintiffs to begin to grade the same; and the said * plaintiffs further aver, that they were hindered and prevented **321** by the promise and undertaking of said defendants, made in manner and form as above stated, from undertaking and engaging in jobs of work on other railroads and canals, and lost thereby the opportunity of making large gains and profits from the same, of all which premises the defendants on the day and year aforesaid, at the county aforesaid, had notice. And the said plaintiffs aver, that from the time of making the said promise and undertaking of the said defendants, the plaintiffs were ready and willing in a reasonable time, and for a long space of time, *scilicet*, from the time of making said promise and undertaking until the 1st December, 1835, at the county aforesaid, and offered to begin to grade

all that portion of the railroad above mentioned, and to complete the same in a workmanlike manner, according to the directions of the engineer, in a reasonable time, of all which premises the defendants at, &c., on, &c., and often afterwards, had notice. Yet the said plaintiffs in fact say, that the defendants, contriving and wrongfully intending to injure the said plaintiffs, did not, nor would perform their said promise and undertaking in form aforesaid made, but totally disregarding the same, did not nor would permit or suffer the said plaintiffs to begin to grade that portion of the railroad above mentioned, betwixt Charlestown and the Susquehanna River, but wholly neglected and refused so to do, and on the contrary thereof, they the said defendants, after the making of their said promise and undertaking, and whilst the said plaintiffs were ready and willing to begin and complete the grading of that part of the railroad above specified, in a workmanlike manner, and according to the directions of the engineer, to wit, on the 1st December, 1835, at Cecil County aforesaid, wrongfully and unjustly, and without the license or consent of the plaintiffs, and against their will, contracted for the grading of the above stated portion of railroad betwixt Charlestown and the Susquehanna River, with other persons than the plaintiffs, and caused the said portion of railroad to be graded by them, whereby the plaintiffs were hindered and prevented from beginning

322 to grade said portion of railroad, and were *wrongfully and unjustly, and against their will, discharged by the defendants from beginning and completing the grading of the said railroad betwixt Charlestown and the Susquehanna River, in a workmanlike manner, and according to the directions of the engineer, nor did the said defendants pay the plaintiffs twenty-four cents per cubic yard for the common excavation on said portion of the railroad, nor any part thereof, nor did said defendants pay the plaintiffs for the rock excavated according to the estimate of the engineer, although often requested so to do, to wit, at the county aforesaid; but to pay the same or any part thereof, the said defendants have hitherto wholly refused, and still do refuse, whereby the said plaintiffs have been deprived of all the profits, benefits and gains, which otherwise might and would have accrued to them from the completion of grading of the said railroad betwixt Charlestown and the Susquehanna River, to wit, at, &c.

4th Count.—And the said plaintiffs further complain, for that whereas the said plaintiffs heretofore, to wit, on the 12th of July, 1836. at Wilmington, that is to say, at, &c., made another agreement in writing with the said W. and S. R. R. Co., and amongst other things in said agreement specified, to do all the grading of that part of sect. No. 9, in the State of Maryland, of the W. and S. R. R., which extends from Station No. 191 to the end of the piers and wharf in the river Susquehanna, opposite Havre de Grace, according to the directions of the engineer and the specifications in said agree-

ment, for the sum of twenty-six cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from Station No. 191, by the 15th of October, 1836, and the residue by the first day of November ensuing, which said agreement and specification, and all things therein contained, is of the tenor and in the words following, to wit:

"Agreement between S. H. and H. H. of the first part, and the W. and S. R. R. Co. of the second part."

"The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees to and * with the party of the second part, to furnish and deliver at the proper cost of the said party of the first part, the building **323** materials, which are described in the annexed schedule to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities as the party of the second part shall require and designate; and faithfully, diligently and in a good and workmanlike manner, to do, execute and perform the office, work and labor in the said schedule mentioned.

"And the party of the second part, in consideration of the premises, covenants and agrees to pay the party to the first part, the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein described. Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare the contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except or to question the same in any place or under any circumstances whatever. But the party of the first part shall still remain liable to the party of the second part for the damages occasioned to him by the said non-compliance, irregularity or negligence: and provided also, that in order to the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands until the completion of the contract, fifteen per cent. of the moneys at any time due to the said parties of the first part. Thus covenanted and agreed by the said parties this 12th day of July, 1836, as witness their seals, &c.

SEBRE HOWARD, [Seal.]
JAMES CANBY, Pres't, [Seal.]

324 * Signed, sealed and delivered in the presence of —. [The date above changed to 1st of November, and in the schedule the price changed to twenty-six cents, and an extra price for extra haul inserted, and the work fixed to be done by November 1st, 1836, before signing.]
WM. P. BROBSON.

Schedule referred to above.

The above named S. H. and H. H. contract to do all the grading of that part of section No. 9 in the State of Maryland of the W. and S. Railroad, which extends from Station No. 191 to the end of the piers and wharf in the river Susquehanna opposite Havre de Grace, according to the directions of the engineer, and according to the specifications hereto annexed, for the sum of twenty-six cents per cubic yard, for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from Station No. 191 by October 15th, 1836, and the residue by November 1st ensuing. They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment, all other portion of the hauling together, not to exceed an average of eight hundred feet, and for any distance exceeding the said average, the price is to be one and a half cents per cubic yard for each hundred feet haul. The party of the second part contracts to pay to the said Sebre Howard and Hiram Howard, the said sum of twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing or hard material is required, on the side ditch or ditches through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c., &c.

Specification of the manner of grading the Wilmington and Susquehanna Railroad.

Before commencing any excavation or embankment the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of

325 * afterwards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of the road, as directed by the engineer. In cases of embankment, a grip must be cut about one foot deep for footing the slopes and preventing them from slipping, the embankments must be very carefully carried up in layers of about one foot in thickness, laid in a hollow form, and in so doing all hauling or wheeling, whether loaded or empty, must be done over the same, the slopes of the excavations and embankments will be one and half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the

sods removed from the original surface; side ditches and back drains must be cut whenever ordered by the engineer at the same price as the common excavation; the side ditches will, on an average, be about nine feet wide on top and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling; where more earth is required than is procured from the excavation, the contractor shall take it from such places as the engineer may direct, the cost per cubic yard being the same as the other parts. Where there is any earth from the excavations more than is required from the embankments, it shall be placed where ordered by the engineer. All the estimates will be made by measuring the excavations only. Loose rock, boulders, iron, stone or other pebbles of a less weight than one-fourth of a ton, are to be removed by the contractor at the same price as the common excavation, but in cases of larger size, or for blasting, the price shall be a matter of special agreement between the contractor and engineer; and if the former should not be willing to execute for what appears to the engineer a fair price, the latter may put the same into other hands. No extra allowance will be allowed for cutting down trees, grubbing, bailing or other accidental expenses. Measurements and estimates will be taken about
 * once a month, and full payment will be made by the direc- **326**
 tors after deducting 15 per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before —. It is to be distinctly understood by the contractors that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,

Chief Engineer of the Wil. and Sus. R. R.

And thereupon afterwards, to wit, on the said 12th July, 1836, at the county aforesaid, in consideration that the plaintiffs at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfil all things in said agreement on said plaintiffs' behalf to be performed and fulfilled, they the said defendants undertook and faithfully promised the said plaintiffs to perform and fulfil all things in said agreement on the defendants' part to be performed and fulfilled; and said plaintiffs declare, that soon after the making of the said agreement, for the purpose and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23d July, 1836, at the county aforesaid, they promptly and diligently commenced doing and executing the grading of that part of section No. 9 in said agreement set out and contracted for by them, and were fully prepared with laborers, means and instruments to execute the work in the manner and in the time

19th January, 1837; and said plaintiffs declare, that the engineer of said company estimated the work of said plaintiffs done under said agreement in the month of December, 1836, according to measurement and valuation, at the sum of three thousand six hundred and some dollars, before deducting the fifteen per cent. specified in said agreement to be retained by said company until the final completion of said work; yet the said defendants disregarding the terms of said agreement, although often requested so to do, at, &c., aforesaid, have not yet paid the said sum of \$3,600, after deducting the fifteen per cent. aforesaid, nor any part of the said fifteen per cent. so retained as aforesaid, but contriving and intending to defraud and injure said plaintiffs, after paying them one thousand dollars, a part of said estimate, refused and still do refuse to pay the balance. And said plaintiffs further aver, that according to the terms of said agreement, when there was any earth from the excavations more than was required for the embankments, it was to be placed where ordered by the engineer, yet the defendants well knowing the premises, on the 19th of January, 1837, at Wilmington, that is to say at, &c., notwithstanding the request and demand of the plaintiffs in this behalf but intending and contriving artfully and deceitfully to defraud and injure the said plaintiffs, refused to permit the engineer to point out or order any where to deposit the earth from the excavation, although there was a large quantity of earth to be removed from the
330 *excavations more than was required for the embankments, and also refused to pay said plaintiffs one and a half cents per cubic yard for each hundred feet haul over eight hundred feet in distance, as by the terms of said agreement they were bound and required to do, but said defendants artfully and fraudulently contriving to impose upon said plaintiffs, by forcing them to submit to an alteration of the terms of said agreement, or to be deprived of all the benefits and advantages to which they were entitled to under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions on their part to be observed, and fulfilled and kept, whereby said plaintiffs were suddenly thrown out of employment, and unjustly and fraudulently prevented completing the work contracted to be done by them as aforesaid, and have lost all gains and profits which they might and would otherwise have made and acquired from finishing the work according to said agreement.

5th Count.—And the said plaintiffs further complain, for that whereas after the said 15th October, and the said 1st November, the times fixed for the completion of the said work and labor designated in the said agreement, on the 12th July, 1836, stated in the fourth count of this *narr.* the said plaintiffs at the special instance and request of the said defendants, to wit, on the 2nd November, 1836, at Wilmington, to wit, at, &c., aforesaid, undertook and agreed with the said defendants to finish and complete all and singular the work

and labor in the agreement aforesaid, which then remained unfinished and incomplete, at the prices and in the manner stipulated in the said agreement, and to do and perform the same within a reasonable time, and that the said defendants in consideration thereof, promised and agreed to pay the said plaintiffs all that was then due them, and also for the said work and labor the prices stipulated in the said agreement, and to do and perform all and singular the covenants on the part of the said defendants to be done, as mentioned in the said agreement; and the plaintiffs further aver, that in consideration thereof, they the said plaintiffs did proceed diligently and faithfully with the said work and labor at the said instance and request of said defendants, and that * while they were so employed faithfully and diligently executing the said work and labor, **331** and after the same had progressed considerably, the said defendants refused to do and perform the covenants and agreements on their part to be done and performed, and that said defendants, and their agents and engineers refused to suffer and permit the said plaintiffs to proceed with the said work and labor, and to finish and complete the same according to the terms of the said agreement; and the plaintiffs in fact say, that they were prevented from finishing and completing all the said work and labor in the manner stipulated in the agreement aforesaid, by the orders, directions, hindrance and interference of the said defendants, their agents and engineers, and that they the said plaintiffs, were ready and willing to have done and performed, and offered to do and perform all and singular the said work and labor within a reasonable time, and in the manner stipulated in the agreement aforesaid, of which said defendants then and there had notice, to wit, at the county aforesaid; but the plaintiffs were prohibited and prevented from doing the said work and labor at the times and in the manner aforesaid, by the refusal of the said defendants to observe and perform the covenants and agreements on their part to be done and performed as set forth in the written agreement aforesaid, and by the interference and hindrance of said defendants, and their agents and engineers, to wit, at the county aforesaid. By reason of which said unjust and fraudulent conduct on the part of the said defendants the said plaintiffs were prevented from realizing the benefits, profits and advantages which they would have derived from the completion of the said work and labor, and the observance of the said last mentioned agreement on the part of the said defendants; wherefore the said plaintiffs say they are injured, and have suffered damages fifty thousand dollars.

6th Count.—And the said plaintiffs further complain, for that whereas on the 2nd November, 1836, at the special instance and request of the defendants they undertook and agreed with the defendants, to finish and complete the work and labor upon section number nine on the railroad of the defendants, which * runs from **332** Wilmington to the Susquehanna River, upon the following

terms and conditions, that is to say : (here insert the agreement of the 12th July, 1836, leaving out the words, namely: "one mile from station number one, and the residue by November the first ensuing," and inserting in the place thereof, "and within a reasonable time,") and that the said defendants in consideration thereof, promised to pay for such work and labor the prices stipulated as aforesaid, and that in pursuance of said agreement, did forthwith proceed with the said work and labor up to the month of January, 1837, when they were prevented by the said defendants from further progressing in said work, and from finishing and completing the same according to the terms of said agreement in the first instance, because the said defendants refused to suffer their engineer to order or direct, where the surplus earth from the excavations on said section over and beyond the amount of earth required for the embankments in the same section, should be placed, as they were bound to do by the said agreement, and afterwards in the same month, fraudulently and illegally entirely stopped the said plaintiffs, and prevented them from going on with and completing the same, and afterwards gave the work to somebody else, by which the said plaintiffs were prevented from finishing and completing their said agreement; and the said plaintiffs further aver, that if they had been permitted to go on with and finish the said work under said contract, as they offered to said defendants and intended to do, they would have made large profits, to wit, fifty thousand dollars. Whereas by the said conduct of the said defendants they not only lost the said profits, but were put to other losses and expenses by being left in the possession of a large force of men and materials, horses and carts, which they had got together for the purpose of completing said work.

7th Count.—And whereas also the said defendants afterwards, to wit, on the 1st of August, 1837, at the county aforesaid, were indebted to the said plaintiffs in the further sum of fifty thousand dollars, for the work, labor, care and diligence by the said plaintiffs

333 before that time done and performed, in * and about the business of the said defendants, and for them, and at their special instance and request, and also for divers materials and other necessary things by the said plaintiffs before that time found, and provided and applied in and about that work and labor for the said defendants, and at their like special instance and request, and being so indebted the said defendants, in consideration thereof afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay them the last mentioned sum of money, nevertheless the said defendants not regarding their said promises and undertakings, but although often requested so to do, by the said plaintiffs, have not yet paid the said sum of money or any part thereof, but refuse so to do, to the damage of the said plaintiffs, in the sum of fifty thousand dollars.

8th Count.—And whereas also heretofore, to wit, on the — day and — year at the county aforesaid, in consideration that the said plaintiffs at the like special instance and request of the said defendants, had before that time undertaken to perform certain work, labor and services in and upon the property of the said defendants, to wit, on the railroad between — at the county aforesaid. And said plaintiffs aver, that they did perform the said work and labor upon the property aforesaid, and the said defendants undertook and then and there faithfully promised the said plaintiffs to pay them so much money as they therefor reasonably deserve to have of the said defendants, when they the said defendants should be thereunto afterwards requested; and the said plaintiffs aver, that they reasonably deserved to have of the said defendants the further sum of — like lawful money, to wit, at the county aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid there had notice, nevertheless the said defendants not regarding their said promises and undertakings, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the plaintiffs in this behalf, have not as yet paid the said sums of money, or any part thereof to the said plaintiffs, although often requested so to do, although they the said defendants afterwards, to wit, on the — day of the — of the * year — last aforesaid, at the county aforesaid, were requested by the said plaintiffs so 334 to do, but the said defendants to pay them the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs in the full sum of, &c.

9th Count.—And the said S. and H. Howard, by their attorney aforesaid complain, for that whereas the W. and S. R. R. Co. heretofore, to wit, on the 12th of July, 1836, at Wilmington, that is to say at Cecil Count'y aforesaid, made another agreement in writing with said plaintiffs, by which said agreement amongst other things therein set out, the plaintiffs agreed to do all the grading of that part of section No. 9 of the Wilmington and Susquehanna Railroad in the State of Maryland, which extends from station No. 191 to the end of the piers and wharf in the River Susquehanna opposite Havre de Grace, according to the directions of the engineer and the specifications in said agreement, for the sum of twenty-six cents per cubic yard for every cubic yard excavated, the said section to be completed in a workmanlike manner, viz: one mile from station No. 191 by the 15th of October, 1836, and the residue by the 1st of November ensuing, which said agreement and specification, and all things therein contained is set out in *totidem verbis* in the 4th count of this declaration, as by reference thereto will fully appear. And thereupon afterwards, to wit, on the said 12th July, 1836, at the county aforesaid, in consideration that the plaintiffs, at the instance and request of the defendants, then and there undertook and faithfully promised the said defendants to perform, fulfil and keep all things in said

agreement on plaintiffs' part to be performed, fulfilled and kept, they the said defendants at the same time and place undertook and faithfully promised the said plaintiffs to perform, fulfil and keep all things in the said agreement on the defendants' part to be performed, fulfilled and kept; and said plaintiffs declare that soon after the making of said written agreement, for the purpose and with the intent of fulfilling and performing all things in said agreement on their part to be performed and fulfilled, to wit, on the 23rd of July, 1836, at

335 the county aforesaid, they did promptly and * diligently commence grading that part of section No. 9, in said agreement mentioned, and were fully prepared with laborers, means and utensils to execute the work in the manner and within the time specified in said agreement for the completion of the same, and so continued actively and diligently to prosecute and do the work of grading said railroad and all other things, according to the said agreement, until the 17th of September, 1836, when said plaintiffs were served by the sheriff of Cecil County with a writ of injunction, prohibiting said plaintiffs from working any longer upon a certain portion of said railroad in said agreement specified, which injunction issued from the High Court of Chancery of the State of Maryland in due form of law, and is set out *in eisdem verbis* in the 4th count of this declaration, together with the sheriff's return and the Chancellor's order on the said injunction, as by reference to said 4th count will more fully appear. By force of which injunction the plaintiffs were prevented and delayed from executing the work in said agreement contained in time specified therein for its completion, and were enjoined from working upon part of the road mentioned in the said agreement for a long space of time, to wit, from the said 17th of September, 1836, being the day, on which said injunction was served on said plaintiffs, until the 30th of October in the same year, which was the day when said injunction was appealed and appeal bond filed; and the said plaintiffs aver, that the engineers of the company directed the plaintiffs to make the embankment on the railroad in the agreement mentioned, many feet wider than it was marked out on the plat of the road that was made by the engineer, and examined by the plaintiffs at the request of the defendants before entering into the agreement aforesaid, and said engineer also directed the plaintiffs to make the grade of the said road many feet deeper than it was laid down on said plat, whereby the said plaintiffs were prevented from completing the said first mile of said road before the 20th of October, 1836, which was then completed according to the directions of the engineer, of which the defendants had notice, then and

there, at the county aforesaid. And the plaintiffs say, that

336 * notwithstanding the said injunction and the directions of the engineer aforesaid, they the said plaintiffs did afterwards proceed and continue from the time of making said agreement until the time when the defendants declared the said contract forfeited as

hereinafter stated, duly to comply with and progress in the execution of said agreement, without being guilty of any irregularity or negligence, and did perform, fulfil and keep all things on their part in said agreement to be performed and fulfilled, and did, after the said 15th day of October and the said 1st day of November, in the year 1836, proceed under the orders of the engineer aforesaid, and at the request of the said defendants, and by the authority of said agreement, and under the same, to execute the work in said agreement, according to the terms thereof. And the said plaintiffs declare, that after the said 15th day of October and the 1st day of November, to wit, on the 2nd day of November, in the year 1836, in consideration of the premises, and that the plaintiffs then and there, at the request of the defendants, undertook and faithfully promised the said defendants to perform, fulfil and keep all things in the said agreement on the part of said plaintiffs to be performed and fulfilled in a reasonable time, they the said defendants undertook and faithfully promised the plaintiffs to perform and fulfil all things in said agreement on the part of the said defendants to be performed and fulfilled and kept, according to their true intent and meaning of the said agreement, to wit, on the day and year last aforesaid, at the county aforesaid. And the plaintiffs aver, that they, confiding in the promise and undertaking of the said defendants, secondly and lastly above made, from and after the 2nd day of November, in the year 1836, did proceed and continue to execute the work and labor in said agreement mentioned, according to said agreement, and to perform, fulfil and keep all things in said agreement on their part to be performed, fulfilled and kept, until the 19th day of January, in the year 1837; yet the said plaintiffs in fact say, that the defendants, before the 19th day of January, 1837, contriving wrongfully and unjustly to injure the plaintiffs, did not, nor would perform, fulfil nor keep the * matters 337 and things on their part in said agreement to be performed, fulfilled and kept, according to their undertakings and promises firstly and secondly above made, but thereby craftily and subtly deceived the said plaintiffs in this, to wit, that the said defendants refused to permit the engineer to order or point out any place where the plaintiffs might place the earth from the excavations, when there was a large quantity of earth from the excavations, more than was required for the embankments, and also refused to pay said plaintiffs one cent and a half per cubic yard for each hundred feet haul of the earth from the excavation of the road to make the embankment at the river, although the haul from the excavations to the eastern termination of the embankment at the river, exceeded an average distance of eight hundred feet, and also refused to pay plaintiffs one and a half cents per cubic yard for each hundred feet haul of the earth from the excavation of the road, when all the other portions of the haul exceeded an average distance of

eight hundred feet, as by the said agreement they were required to do. But the said defendants, after they had, as above stated, broken said contract, and disregarded their promises and undertakings, by refusing to comply with the terms of said contract, in the manner hereinbefore stated, and when the said plaintiffs had duly complied with the said contract, and whilst the same was in due progress of execution, and the said plaintiffs were not irregular or negligent, and before a reasonable time had been allowed for said plaintiffs to complete the said contract, the said defendants attempted to declare the said contract forfeited and null, without the consent and against the will of said plaintiffs, to wit, on the 19th day of January, in the year 1837, at the county aforesaid, whereby the said defendants did not, nor would suffer or permit the said plaintiffs to proceed any further to execute the said contract, but then and there wrongfully discharged the said plaintiffs from any further completion of their said agreement, and hindered and prevented them from finishing the work in said contract specified. Nor did the said defendants pay the said plaintiffs twenty-six cents per cubic yard for every cubic yard of earth excavated on said * road, according to

338 the measurement and valuation of the engineer, but to pay the same or any part thereof the said defendants, although often requested so to do, to wit, at, &c., have hitherto wholly refused, and still refuse, whereby the said plaintiffs say that they have not only been refused payment of the money due them for work done on said railroad before the said 19th day of January, 1837, but have also been deprived unjustly of all the profits, benefits and gains which otherwise might and would have accrued to them, if they had been permitted by said defendants to complete the work in said contract mentioned.

Whereupon, the said plaintiffs say they are injured and defrauded, and have sustained damages to the amount of fifty thousand dollars, to wit, at, &c., and thereupon they bring their suit, &c.

To this declaration the defendant pleaded :

1st. Non assumpsit, and

2nd. Payment and satisfaction, on which issues of fact were joined.

3rd Plea as to 4th Count. "That after the making of the said supposed agreement in the said fourth count mentioned, to wit, on the 18th January, 1837, the said plaintiffs had become, and were for a long space of time then next before, had been, irregular and negligent in the prosecution of the work in said agreement mentioned, and had not duly complied with the terms of said agreement, to wit, at, &c.; and the said defendant in fact further saith, that after the making of the said agreement, and before, and on the said 18th January, 1837, at, &c., the said work and labor in the said agreement mentioned, was not in due progress of execution, to wit, at, &c., of all which said premises the said plaintiffs and this defendant then

and there, to wit, on, &c., at, &c., had notice; and the said defendant in fact further saith, that afterwards, and whilst the said plaintiffs so were and continued to be irregular and negligent in the execution of the said agreement, and without having duly complied with the terms of said agreement, and whilst the said work was not in due progress of * execution, this defendant being of opinion that the said agreement had not been duly complied with by the said plaintiffs, and that the work in said agreement mentioned, was not in due progress of execution, to wit, on, &c., at, &c., in virtue of the provisions of said agreement, and in exercise of the authority thereby given and reserved, did declare the said agreement to be forfeited, as for the cause aforesaid this defendant might lawfully do, of all which premises the said plaintiffs afterwards, to wit, on, &c., at, &c., had notice. By reason whereof, and by force and effect of the said agreement, the same agreement thereby became and was null. And this, &c.” 339

The 4th plea as to the 5th count; the 5th plea as to the 6th count, and the 6th plea as to the 8th count, were similar to the 3rd plea as to the 4th count, and relied upon a forfeiture of the contract of July, 1836, announced on the 18th January, 1837, as a bar to, &c.

7th plea to 1st Count. That after the making of the said supposed contract in the said first count mentioned, and before the commencement of this suit, to wit, on the 12th July, 1836, a certain agreement by deed in writing, was then and there made and entered into by and between the said plaintiffs and the said defendant, and which said last mentioned agreement was of the tenor, following, to wit. (This plea then set out at length the agreement of 12th July, 1836—see *ante*.) And said defendant in fact says, that the said part of sec. No. 9, in the State of Maryland, of the W. and S. R. R. which extends from station No. 191 to the end of the piers and wharf in the River S., opposite Havre de Grace, as mentioned in said last mentioned agreement, is a part of that part of the said railroad between Charlestown and Havre de Grace, in said first count mentioned, and which is thereby alleged to have been included in the said supposed contract in said count mentioned, and not another or different part, of which premises the said plaintiffs and this defendant, before, and at the time of the making of the said agreement, in this plea recited, had notice, to wit, at, &c.; and the said defendant in fact says, that after the making of the said agreement in this plea above * recited, the said plaintiffs, under and in virtue of the said agreement in this plea above recited, commenced and prosecuted the work on that part of section No. 9, in the State of Maryland, of the W. and S. R. R., which extends from Station No. 191, to the end of the piers and wharf in the River Susquehanna, opposite Havre de Grace, as mentioned in the same agreement; and that all the work which was done by said plaintiffs on that part of said section No. 9, was commenced, prosecuted 340

and done, under and in virtue of said agreement in this plea above recited, and not otherwise, nor under any other or different agreement. By reason of which said premises, the said supposed contract in the said first count mentioned, became merged, extinguished, waived, released and abandoned. And this, &c.

The 8th plea to second count and 9th plea to 3rd count, were similar to 7th plea to 1st count.

The plaintiffs demurred to the 3d, 4th, 5th, 6th, 7th, 8th and 9th pleas, in which the defendant joined, and the County Court [CHAMBERS, C. J. and HOPPER and ECCLESTON, A. J.,] gave judgment on the demurrers for the defendant, from which the plaintiffs prosecuted this appeal.

The cause was argued before STEPHEN, ARCHER, and DORSEY, JJ.

H. Stump and Reverdy Johnson, for the appellants. *O. Scott and Nelson*, Att'y-Gen'l of the U. S. for the appellees.

STEPHEN, J., delivered the opinion of this Court. This suit was instituted in the Court below upon two contracts, the one bearing date in the year eighteen hundred and thirty-five, and the other in the year eighteen hundred and thirty-six. The appellee, the defendant in the Court below, filed several special pleas to the plaintiffs' declaration, which contained several counts; and to those pleas the appellants, who were the plaintiffs, demurred generally. The defence of the defendant was founded upon an alleged extinguishment of the contract of 1835, by the operation of the contract of 1836, **341** * which, it is admitted by the parties, covered a part of the work to be done under the contract of 1835, and for which a different price was to be paid. The suit being upon the contract of 1835, for the recovery of damages, for not being permitted to execute it by the wrongful acts and doings of the defendants, if the defence of the defendants is well founded, that it was extinguished, either wholly or partially, the action on the contract itself, which was an entire one for the graduating the road from Charlestown to Havre de Grace, for twenty-four cents per cubic yard, cannot be sustained. To repel the inference of an extinguishment, either general or partial, of the contract of 1835, the plaintiffs aver in their declaration, that the contract of 1836 was entered into by them with an express understanding on their part, and that they so declared to the defendants at the time, that the contract of 1835 was not waived or abandoned by that of 1836, except so far as the road covered by first contract was embraced by the second; and the plaintiffs contend that the silence of the defendants, when so informed, was evidence to go to the jury from which their assent might be inferred. But, according to the established principles of pleading, the fact of assent ought to have been averred, and not the evidence of it, (if the evidence stated was ad-

missible to control or vary the written contract,) which is always matter for the consideration of the jury, and not for the decision of the Court. See *Gould's Pleadings*, 152, where it is said, "all facts essential to the right of action or the defence must in general be expressly and substantively alleged. Hence stating the mere evidence of a material fact is not sufficient; the fact itself must be stated, otherwise the allegation will present no subject to which the law can be applied. Besides such a mode of pleading would, if admissible, refer the matter of fact in question to the Court, instead of the jury." He there puts the case of an action of trover, where the plaintiff alleges a property in the goods, the loss, the finding, and a demand and refusal, but omits to aver a conversion, and says the declaration would be ill. This being a suit upon the contract to recover damages, and the contract being entire * and indivisible, the suit cannot be sustained, if any part of it has been annulled by the act and agreement of the plaintiffs themselves; and looking to the pleadings in the case, as spread upon the record, we are bound to assume that a part of it was annihilated by the consent of the plaintiffs themselves. In *Chitty on Contracts* it is said to be "a general rule that an entire contract cannot be apportioned; and if a party undertake to complete a certain act, before his claim to remuneration is to accrue, he cannot recover for a partial performance, although the completion was prevented by accident, as fire, &c." To the same effect this Court have decided, in 6 *H. & J.* 44, where they say, "The agreement formed an entire contract, and to enable the plaintiff to recover on it he must prove a performance, or tender to perform every thing required by it on his part to be performed." The contract being vacated and rendered legally inoperative in part by the consent of the plaintiffs themselves, the conclusion is inevitable that no action can be sustained upon it for the recovery of damages, on the ground that the plaintiffs were prevented by the wrongful act of the defendants from fulfilling it. Where the original contract is rescinded by the parties, after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable, in such case a recovery may be had for the part performance on a general count, but not by declaring on the contract itself. To this effect is the case in 6th *H. & J. Repts.*, 38. If the entirety of the contract is disaffirmed by receiving a partial benefit, the plaintiff may recover for the work done on a general count, but not by declaring on the special agreement, (*Chitty on Contracts*, 273.) The same principle is to be found recognized (if authorities be necessary for so plain a proposition) in 12th *John. Repts.* 165. In that case the plaintiff "agreed to work for the defendant ten and a-half months, and spin yarn, at three cents per run; and afterwards left the service of the defendant, and brought an action against him for spinning 845 runs of yarn, at three cents per run; it was held that

343 the contract * of the plaintiff was entire and must be performed as a condition precedent before he could bring an action against the defendants for the price of his labor." The suit upon the second contract of the 12th of July, 1836, we think ought, upon the pleadings in the case, to have been sustained. It is a rule in pleading that "each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse. For, as each party is allowed to deny, in some form, (either by a general or precise traverse,) all material facts alleged against him, the omission by either party to traverse any such fact, alleged by his adversary, is justly considered as an admission of it." *Gould's Pleading*, 152.

It appears by the fourth count of the plaintiff's declaration that the defendants were in default in not paying them a large sum of money according to contract, which was due according to the estimate of the engineer for work done in the month of December, 1836, which was due and payable before the contract was declared to be forfeited; and also that they refused to permit the engineer to designate or point out a place where the surplus earth arising from the excavations was to be deposited; and also refused to pay the plaintiffs one other sum of money for extra hauling beyond a certain distance, as specified in their said agreement, and artfully and fraudulently contriving to impose upon said plaintiffs by forcing them to submit to an alteration of the terms of said agreement or to be deprived of all the benefits and advantages to which they were entitled under the same, declared the said agreement to be forfeited, and refused to comply with the terms and conditions thereof, whereby the said plaintiffs were thrown out of employment, and fraudulently prevented from completing, &c., and have lost all the gains and profits, &c.

In the plea filed by the defendants to this count of the plaintiff's declaration, these breaches of the contract on their part are not denied, and of course, according to the established principles of pleading, they are to be taken and considered as admitted. Such being the state of the pleadings, and the admissions of fact flowing from them, it follows as a necessary * consequence that such **344** annulling of the contract was a breach thereof, for which the plaintiffs had a right to recover the damages flowing therefrom, and also for the damages resulting from the previously enumerated breaches of the agreement. It was not necessary to aver damages in the plaintiff's fourth count. In 1 *Saunders on Pleading and Evidence*, 165, it is said: "If the contract be broken the plaintiff will be entitled to some damages, however small, whether they be stated or not, for damages will be implied from the very breach itself; and wherever the damages sustained necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, in order to prevent the surprise on the defendant, which might otherwise ensue at the trial; and if

he do not state them particularly he will not be permitted to prove them in evidence." In the same book, at page 513, it is said: "Where damages are the principal object of the action the declaration should conclude 'to the damage of the plaintiff' of a sum sufficient to cover the real damages sustained." So, also, same book and same page, speaking on the same subject, it is said: "An omission in stating damages, when necessary, would be bad on demurrer, and perhaps after judgment." So, also, in 2 *Johns. Reps.* 149, it is said: "The damages sustained are matter of evidence, and need not be alleged, nor are they rarely ever stated, but in a general manner."

In this case the plaintiff's declaration concludes in the usual manner, and charges that they "have sustained damages to the amount of fifty thousand dollars, to wit, at the county aforesaid, and therefore they bring their suit, and so forth." This general conclusion is sufficient as to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them. The judgment of the Court below is reversed, and a *procedendo* ordered.

Judgment reversed, &c.

* JOHN TOMLINSON'S Lessee *vs.* JACOB DEVORE.—Decem- 345
ber, 1843.

The Courts of common law in Maryland have jurisdiction in cases involving the rights of lunatics, unless they have been ousted by the Act of 1785, ch. 72, and its supplements, which they do not do.

The Act of 1785, ch. 72. Rev. Code, Art. 66, sec. 84, contains no express ouster of the jurisdiction of the Courts of common law, and hence they have concurrent jurisdiction over the rights of lunatics with the Court of Chancery.

To divest Courts of general jurisdiction of their jurisdiction, terms to that end must be employed in the statutes intended to accomplish such a purpose, and it cannot be effected, unless by express terms, or by necessary implication. (a)

Upon a judgment, execution and sale, the title to land passes, though the defendant, in the judgment was a lunatic at the time of its rendition. (b)

Courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales. (c)

(a) Approved in *Jenkins vs. Simms*, 45 Md. 587.

(b) Approved in *Stigers vs. Brent*, 50 Md. 220, where it was held that a lunatic may be sued at law for a debt which he contracted when of sound mind, and judgment therefor obtained against him, and that equity will not declare such judgment a nullity.

(c) Approved in *Wampler vs. Wolfinger*, 18 Md. 348; *Elliott vs. Knott*, 14 Md. 185; *Schley vs. Baltimore*, 29 Md. 47; *Wilson vs. Miller*, 30 Md. 90; *Harris vs. Hooper*, 50 Md. 549. See also, *Barney vs. Patterson*, 6 H. & J. 157.

APPEAL from Allegany County Court. This was an action of ejectment, brought on the 5th October, 1836, for a tract of land called "Sampson's Riddle Amended." The defendant took defence on his title, and pleaded not guilty.

At the trial of the cause, the parties agreed, "that no objection shall be made to the suit by the defendant's counsel, on the ground that the said Tomlinson appeared by attorney, instead of his trustee, but that the said suit shall stand as though said Tomlinson appeared by his trustee. The plaintiff, on his part agrees, that if it be a valid objection to said suit, because the same was not brought in the name of the trustee instead of the name of the lunatic, then he will suffer a *non pros*."

The cause was then submitted to the Court on the following statement of facts:

The parties, plaintiff and defendant, in this case, agreed to the following facts in the nature of a case stated for the opinion of the Court. It is admitted that the land, for the recovery of which this suit is brought, was conveyed by John Tomlinson, Sen., the father of the plaintiff, to the plaintiff, by his deed duly executed, acknowledged, and recorded on the 3rd day of August, 1818. That on the 21st of July, 1821, four judgments were recovered by certain creditors of the said John Tomlinson, the plaintiff, against him, before a justice of the peace for said * county; that on the 12th January, 1822,

346 two other judgments were recovered by creditors of the said John Tomlinson, the plaintiff, against him, before a justice of the peace of said county, and that these judgments being unpaid, were revived by *scire facias* on the same in August, 1827; that at the April Term of Allegany County Court, 1827, a judgment was rendered by said Court against the said John Tomlinson, for a debt of his, in favor of the creditor and plaintiff in that case; that in October, 1827, *fi. fas.* were issued on all said judgments, and placed in the hands of the sheriff of Allegany County, who, in virtue thereof, levied them on the land, for the recovery of which this suit is brought, and sold the same at public sale, to the highest bidder, and that Jacob Devore, the defendant in this case, became the purchaser thereof, paid the consideration since he bid for the same, to the said sheriff, who, by his deed of bargain and sale, duly executed and acknowledged on the 17th day of February, 1828, conveyed said land to said Devore, who took possession of said land; he has ever since, up to this time, continued to hold possession of the same; that on the 12th day of July, 1822, application was made to the Chancellor of Maryland, by John Tomlinson, Sen'r, the father of the plaintiff, for a writ of lunacy to be issued, to enquire of the lunacy of said John Tomlinson, Jun.; that a writ was accordingly issued, and an inquisition regularly taken and found, and that by that inquisition the said John Tomlinson was found to be a lunatic on the 25th day of July, 1822, when the inquisition was taken, and to have been so

for five months and upwards before that time, which inquisition was returned to the Chancery Court, and upon a petition filed by John Tomlinson, Sen'r, the father, he was appointed the trustee for the care and custody of the person and estate of the said John Tomlinson, Jun., who was so found to be a lunatic.

If, upon the foregoing statement of facts, the Court are of opinion that the judgments at law, *fieri facias*, sale by the sheriff, and conveyance made by him of the land as aforesaid, to the defendant, are sufficient to transfer the title to said land to the defendant, notwithstanding the lunacy of the plaintiff, * as found by the inquisition as aforesaid, that then the verdict is to be entered for the defendant; but if the Court shall be of opinion that the said judgments are inoperative and void, because of the lunacy of the said John Tomlinson, Junior, the plaintiff, as found by said inquisition, as also the *fi. fas.* and sale as aforesaid, that then the verdict of the jury shall be for the plaintiff. **347**

On the foregoing statement, the Court were of opinion, that plaintiff is not entitled to recover, and so instructed the jury. The plaintiff excepted.

The verdict and judgment being against the plaintiff, he appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

Price, for the appellant.

McKaig, McMahon, and *F. A. Schley*, for the appellee.

SPENCE, J., delivered the opinion of this Court. The statement of facts agreed to, and upon which the Court below instructed the jury in this case, presents for the revision of this Court, a question of great importance and interest.

Questions of jurisdiction in relation to Courts must always be important, because they are questions which ascertain the limits of judicial power; and in this case, it is one of peculiar interest, arising from the character of the infirmity of the individual, which, it is insisted, exempts him from the jurisdiction of the Courts of law.

The argument of appellant's counsel conceded that the Courts of common law had jurisdiction in Maryland in cases involving the rights of lunatics, unless they had been ousted of their jurisdiction by the Act of 1785, ch. 72, and the supplements thereto; and had this concession been withholden, the authorities, both in this country and England, are conclusive.

* The question then is, does the Act of 1785, ch. 72, or any supplement thereto, oust the Courts of law of jurisdiction in this case? After a careful examination of the Act of 1785, ch. 72, we may venture to affirm that there is no language employed, or combination of words used, which can be construed to divest the **348**

common law Courts of jurisdiction in cases involving the rights of lunatics, or raising even a strong implication of the fact.

The Act of 1785, ch. 72, contains no expression of the same signification or import, as that used in the *Statute of New York*; 1 *N. K. Laws*, 147; in relation to which latter statute, Chancellor Kent, says: "the fit and proper remedy for the creditor of a lunatic, is in this Court, and not by any action at law. The commitment, by statute, of the care of the lunatic and his estate, to this Court, and the power given to it to sell the real estate, shows that this is the proper tribunal for the creditor to resort to." Had the Chancellor's opinion stopped here, the fair conclusion would be, that the Chancellor had concurrent jurisdiction, under this statute, with the common law Courts.

Chancellor Kent, in the same case, *Brasher vs. Cortland*, 2 *John. Ch. Ca.* 403, in commenting on the 6th section of the same statute, uses the following language: "But this last provision is important in another view, it goes absolutely to interdict the remedy at law, by prohibiting a sale of the real estate under execution." The negative expression in the *Statute of New York*, the Chancellor construes to confer exclusive jurisdiction, and without this provision, the irresistible inference is, that his jurisdiction would be concurrent with the Courts of common law. The Act of Assembly of Maryland provides, "that the Chancellor shall have full power and authority, in all cases, to superintend, direct and govern the affairs and concerns of persons who are or may be lunatic or idiots, both as to the care of their persons and estate, and may appoint a committee, &c., and that if it will be for the benefit and advantage of the estate of such persons, (idiots or lunatics,) to sell a part of the real estate to pay their debts, &c." Thus the 6th section of the Act * of 1785, is very similar

349 to the *Statute of New York*, and may, with great fairness, be construed in cases involving the rights and interest of lunatics to confer jurisdiction upon the Court of Chancery in Maryland; but as there is no express ouster of the jurisdiction of the Courts of common law, we are driven to the conclusion, that they have concurrent jurisdiction with the Court of Chancery.

The doctrine is clearly settled by a long train of concurrent decisions, that to divest Courts of general jurisdiction, of their jurisdiction, express terms to that end must be employed in the statute, and that it cannot be affected, unless by express terms, or by necessary implication. *Vide Rex vs. Chaseley*, 2 *Bur.* 1040; *Heath & Room*, 2 *Hill's R.* 42—*ex parte*.

The view which we have taken of the question raised upon the first point, reaches, controls and determines all the other questions in this cause. The judgments being good at law, and no objection made to the executions, or sale made under them, in point of form or substance, it follows as a necessary consequence, that the title

passed by the sale to the purchaser, and that the Court properly instructed the jury to find for the defendant.

We forbear to present either arguments or authorities to prove the jealous vigilance with which Courts of justice guard and maintain the titles of purchasers, acquired under judicial sales, as there is no portion of the law, in regard to which the adjudications have gone farther, or are more uniform and conclusive.

Judgment affirmed.

* JOHN S. STILES *et al.* vs. SARAH BROWN *et al.*—Decem- 350
ber, 1843.

Where the Court perceives from the mutual allegations of the parties, and from the evidence adduced in the cause, that they had stated and settled an account between themselves, they cannot claim a decree to account.

A complainant seeking to investigate ancient accounts, will have his case subjected to severe scrutiny; although he is not to be visited with all the consequences of laches; while on the other hand, the defendant's evidence may receive a more indulgent consideration. The time at which the claim is advanced, and a failure to prosecute it against original parties, while they were alive, are circumstances calculated to create suspicion against such a claim, and in a doubtful case strengthen the defences which the representatives of such original parties may set up.

(a)

Where the parties settle and adjust their mutual claims, and one gives the other a note for the balance due, this forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud.

APPEAL from the Court of Chancery. The bill of John S. Stiles, of the City of Baltimore, and of William P. Maulsby, trustee, filed on the 2nd July, 1840, for the benefit of the creditors of said Stiles, stated: that sometime about the year 1827, a judgment having been rendered against J. S. S. in Baltimore County Court, for the sum of \$1,000, or thereabouts, he requested a certain Stewart Brown to become his surety on an appeal bond, for the purpose of carrying said cause to the Court of Appeals; and at the same time he borrowed from said Brown his promissory note for the sum of about \$1,900, and for the purpose of indemnifying the said B. for his said suretyship, and of securing the payment of the said note so borrowed, he conveyed to the said B. several lots or parcels of land lying and being in the City of Baltimore, and six shares of stock in the Temascaltepec Mining Company of Baltimore; that several, if not all, of the said shares of stock were sold by the said Brown, in his life-time, but for what prices or sums your orators do not know, ex-

(a) Approved in *Donaldson vs. Raborg*, 28 Md. 66. See also *Gover vs. Hall*, 3 H. & J. 38; *Chew vs. Farmers Bank*, 2 Md. Ch. 281.

cept two shares, which sold for the sum of \$1,265, as stated by said B.; and that said lots or parcels of ground were also sold, partly in the life-time of the said B. and partly since his death; that the complainants have no accurate knowledge of the amount of money realized by said sales, but are fully convinced that it largely exceeds

the * amount of the said judgment and note; and, that a considerable sum is now due and owing to your orators, who further state that, sometime in the year 1835, John S. Stiles made application for the benefit of the insolvent laws of Maryland, and that William P. Maulsby has been duly appointed permanent trustee for the benefit of the creditors, and has given bond, with security, according to law; that the said S. B. departed this life sometime in the year 1832, intestate, and that letters of administration have been granted to Sarah, George and John N. Brown; that said administrators, though often requested, have wholly refused and neglected to render to your orators any account of the moneys received by the said S. B. for the said stocks and for said lots or parcels of ground, and to pay over the balance now remaining in their hands after payment of the said judgment and the promissory note, &c.

Prayer that subpoena may issue to said administrators, &c., and that complainants may render a full, true and perfect account of all and singular the moneys received by the said B., in his life-time, or by the said administrators, or any or either of them, since his death, from the sale of said stock and property before mentioned, and that a decree may pass ordering and requiring said administrators to pay over to your orator, William P. Maulsby, trustee, as aforesaid, such balance as upon a fair settlement of accounts may be found due, and that such other and further relief may be granted in the premises as to justice and equity shall seem meet, &c.

The answers of Sarah, George, and John N. Brown, administrators of Stewart Brown, admitted that said Stiles made application for the benefit of the insolvent laws of Maryland, as stated in complainants' bill, some time in the year 1835; but they do not know, and do not admit, that said Maulsby has been duly appointed permanent trustee for the benefit of the creditors of said Stiles. They admit that said S. B. departed this life some time in the year 1832, intestate, and that letters of administration have been granted to these defendants. They also admit that the said John Stiles, by deed of mortgage, dated 24th

May, 1827, conveyed to said S. B. five lots of ground * situate, &c. numbered 21, 24, 44, 55, and 59, for the purpose stated by complainants in their bill; and that by another deed, dated the 31st of July, 1829, said Stiles further conveyed the said lots to said S. B., with power to sell and dispose of the same absolutely, and the proceeds to apply, first to the payment of the said S. B. the amount due to him on the judgment mentioned in said mortgage, and for the payment of which the said S. B. had become surety, and of the sum of money lent and advanced by said S. B. to said Stiles, and secured

by said mortgage, and the surplus, if any, to pay over to said Stiles, or his assigns. They admit that three of said lots were sold in the life-time of said S. B.; but they allege that if said Stiles has no accurate knowledge of the amount of money realized by said sales, as stated in complainants' bill, it is because he has forgotten his own acts, and not because said S. B. failed to render an account thereof to him; for they further allege that it appears by the records of Baltimore County Court, that on the 9th of October, 1829, the said Stewart Brown and John S. Stiles, by deed of that date, conveyed to William D. McKim the lots 21 and 24, above mentioned, the said S. B. receiving \$400 consideration therefor. That on the 10th of October, 1829, the said S. B. and J. S. S., by deed of that date, conveyed to John Kirby the southernmost moiety of lot No. 44, above mentioned, S. B. receiving \$260 consideration thereof; and that on the 10th October, 1829, the said S. B. and J. S. S., by deed of that date, conveyed to William H. Stewart the northernmost moiety of said lot number 44, S. B. receiving \$260 consideration therefor. These defendants allege that they have no accurate personal knowledge of the state of accounts between said S. and said B. in the life-time of said B. but they believe the said S. to have been largely indebted to the said B. at the time of his death. They allege that after the death of the said S. B. said S. filed his bill in this honorable Court against the widow, heirs, and administrators of said B., alleging that said S. B. by his bond of conveyance, dated the 23rd of November, 1830, bound himself to convey to said S. two pieces or lots of ground, that is to say, the *remaining lots of these above mentioned, to wit, the lots numbered 55 and 59, on said S. **353** paying to said B. a promissory note of even date with said bond, drawn by said S. in favor of said B. or order, for \$2,700, bearing interest, payable at four months after date. That said S. in his said bill further alleged that more completely to secure the payment of said promissory note said S. and his wife executed to said B. a mortgage of a tract of land in Queen Anne's County, Maryland, called Marsh's Chester Farm, all of which, &c. These defendants further allege that on the application of said S. in said bill, and with the consent of the defendants thereto, and upon the allegation of said S. therein, that he was indebted to the administrators of S. B. the sum of \$2,700 on said note, a decree was passed adjudging and ordering that on payment by said S. to the trustee in the said decree named, or to the said administrators, or on bringing into this Court, to be paid to them, the sum of \$2,700, with interest thereon, and the costs of the suit, the said John S. Stiles should have, hold, &c.; but in case said sum of money, with interest and costs, was not paid before the 1st of November, 1833, then said trustee was ordered and directed to sell said property for the purpose of settling and paying the same, &c. These defendants further allege, that although said Stiles, in his said bill, admitted that he was indebted to the admin-

istrators of S. B. in the sum of \$2,700, yet that defendants have never claimed said amount from him, but that they have always limited their demand to the sum of \$1,450, which they believe to have been justly due and owing from said S. to said B. on the promissory note of said Stiles, for that amount, dated 11th October, 1832, drawn in favor of said S. B., which note they file, &c. These defendants further allege, that after the passage of said decree, to wit, on the 8th day of August, 1833, the said Stiles and his wife, and the said George Brown, as trustee, by deed of that date, sold another of the above mentioned lots of ground, to wit, number 55, to John Patterson, for the sum of \$750, of which \$150 were received by said Stiles and \$600 by said G. B., in part liquidation of the said sum of \$1,450; and that said deed expressly * admits that said Stiles

354 was indebted to the representatives of S. B. in said sum of \$1,450, as will appear by reference to a copy of said deed, which, &c. These defendants further allege that after crediting said S. with said sum of \$600, a considerable amount still remained due, and said Stiles entirely failing to pay the same at the time limited by said decree for the payment of the same, said trustee proceeded to sell the other lot of ground, to wit, lot number 59 above mentioned; that he sold the same for the gross sum of \$910; that the sale thereof was duly reported to and ratified by this honorable Court.

In relation to the Temascaltepec mining stock, these defendants say they know nothing thereof, except from some loose memoranda contained upon a paper found among the papers left by the said Stewart Brown, and which paper is herewith filed, marked, &c. From this memoranda it appears that said S., to secure his note for \$1,995, due the 26th May, 1828, transferred six shares of said stock to said S. B.; that on the 12th day of September, 1828, one of these shares was sold for \$620; on the 29th day of September, 1828, another was sold for \$645; on the 4th October, 1828, one was returned to J. S. S.; and on the 25th of February, 1829, another was given to said S. to be sold, he to keep \$150, the balance to be paid to S. B. It does not appear whether said Stiles ever sold said share of stock, or paid any part of the proceeds thereof to S. B. From memoranda on another part of said paper it further appears that on the 30th September, 1828, the said S. B. held as security for the note of John McFadon, dated the 29th September, 1828, at ninety days, for \$666, two shares of Temascaltepec mining stock, viz: one of those of said Stiles, and one transferred by Margaret McFadon; and that on the 25th March, 1829, two shares of stock were transferred to Margaret McFadon; whether one of them shares was the property of said Stiles, and if his, what it produced, these defendants do not know. It does not appear what became of the remaining share or shares of stock transferred by said Stiles to said Brown; and defendants do not know whether said share or shares were re-

turned to said Stiles or sold by said Brown, or whether they
 • still remain in the name of said Brown; but they allege that **355**
 said stock, about November, 1829, became perfectly worthless in the
 market, and has so continued ever since; and they think it proba-
 ble that it was so considered both by said Stiles and Brown. They
 allege that there is now standing in the name of Stewart Brown
 some shares of said stock, and that they are ready to transfer
 a share or shares thereof to said Stiles, or to his permanent trus-
 tee, whenever ordered to do so by this honorable Court. They allege
 that they never heard of any claim or demand on account of said
 stock by said Stiles until a long time, that is to say, about six years
 after the death of said S. B.; and they further allege that said Stiles
 having, long after the transfer of said stock to said Stewart Brown,
 given his said note to said Brown for \$1,450, as above alleged, and
 having after the death of said Brown deliberately signed a deed set-
 ting forth that he was indebted to the representatives of said Stew-
 art Brown in that sum, shows satisfactorily that complainants can
 have no fair claim against the representatives of said Stewart Brown,
 for or on account of said stock, but that all accounts between said
 Stiles and Brown must have been settled between them in the life-
 time of said Brown, and the above amount of \$1,450 have then been
 ascertained to be due, &c.

With this answer the various exhibits referred to in it were filed,
 and after proof taken, the cause was referred to the auditor, who,
 with other accounts, reported account B, viz:

Dr. John S. Stiles in acc't with Sarah Brown, George Brown and
 John N. Brown, admin'rs of S. Brown.

1832, Dec. 13th, To his note due this day, ... \$1,450 00

By this sum paid by sale of
 property, 8th Aug. 1833, in-
 terest having been paid... 600 00

850 00

Interest from 8th Aug. 1833,
 to 15th July, 1835: 1, y. 11
 m. 7 ds..... 98 74

948 74

* By proceeds of sale in *Stiles*
vs. Brown and others, in
 this Court, 15th July, 1835,
 and defendants' answer,... 834 53

356

114 21

Interest from 15th July, 1835,
 to 28th Oct. 1841: 6 ys. 3
 ms. 13 ds..... 43 08

Balance due to the defendants \$157 29

Which was ratified by the Chancellor, [BLAND,] 3rd March, 1842, who also decreed that the said balance should be paid the defendants, out of the insolvent's estate, by the trustee, if the assets were sufficient to pay the same.

The complainants appealed to this Court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

Alexander, for the appellants. *Brown and Brune*, for the appellee.

ARCHER, J. delivered the opinion of this Court. It has been admitted by the counsel for the appellant, that if we should believe from the mutual allegations of the parties, and from the evidence adduced, that they had stated and settled an account between them, the appellants cannot claim a decree at our hands. This admission is in strict conformity with the rules of equity governing bills to account.

In our enquiry into this question, we cannot forbear to remark that the account now sought at the hands of the defendant, is of transactions not of recent origin, but of an antiquity, which if it do not in point of law subject the party to be visited with all the consequences of *laches*, yet necessarily subjects his case to a severer scrutiny, and the defendants' evidence to a more indulgent consideration. The time, too, at which this claim is sought to be enforced—several
357 years after * the death of the party with whom the transactions were had, who if living, it is reasonable to believe, might have explained what at this distance of time has thrown difficulties over the transaction complained of; and the failure during the lifetime of the defendant's intestate to institute this proceeding, are circumstances calculated to throw suspicion over the claim of the complainant, and in a doubtful case would strengthen the defences which might be set up in behalf of the defendant.

The testimony, however, in the record leaves us no room for reasonable doubt on the subject. On the 11th of October, 1832, John S. Stiles passed his note to Stewart Brown, payable four months after date, for fourteen hundred and fifty dollars. A bill was filed by Stiles, (at what time the record does not show,) alleging that he had given a mortgage to secure Brown the payment of the sum of \$2,700, and praying a decree for the reconveyance of the property mortgaged upon payment of the debt; and the Chancellor decreed, on 13th July, 1833, the payment of the money and reconveyance of the property, and in case of a failure to pay the money that the mortgaged property should be sold. Afterwards, on the 8th of August, 1833, George Brown, the trustee in said Chancery suit, John S. Stiles and wife, unite in a deed of a lot of land in the City of Baltimore to John Patterson, in which deed the decree above referred to is recited, and it is further recited that at the time of passing the

decree, viz. on the 13th July, 1833, the sum of \$1,450 only was owing to Stewart Brown's representatives from John S. Stiles, which it is recited is known to and admitted by Brown's administrators. Here is a clear and solemn recognition of a settlement of accounts, and an adjustment of claims. Only the sum of \$1,450 was due to Brown. The parties correct the error in the decree by their mutual admissions, and assume the amount of the note of October 11th, 1832, as ascertaining the balance due. But independent of this clear recognition of a settlement and adjustment of the claims of the respective parties, the letter of Stiles, of the 23rd February, 1837, in which he promises to call and adjust the balance, is strongly confirmatory of the idea of a settlement * between the parties, and entirely negatives the hypothesis that the representatives of Brown are **358** either largely indebted to him, or indebted to him at all. By the testimony which the record furnishes we feel ourselves led conclusively to the opinion that the parties settled and adjusted their claims by the note of 13th October, 1832. This of course forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud, and we perceive no evidence of either in the record. If it be true that some of the shares of the Temascaltepec Mining Company remained in the hands of Brown unsold, which had been transferred to him as a security for a loan, we may fairly infer, the proof showing they were worthless in December, 1829, that they were left, on the settlement of October, 1832, when the note was given for \$1,450, in the hands of Brown, with consent of Stiles. They were then worthless and would be of no use to any one.

Upon the whole case, therefore, after bestowing our best reflections upon it, we entertain the opinion that account B, as reported by the auditor, reaches the justice of the case, and as this account has been made the basis of the Chancellor's judgment we affirm his decree.

Decree affirmed.

RICHARD Q. BOWLING and Wife vs. MAREIN T. LAMAR, Adm'r
c. t. a. of JAMES LAMAR.—December, 1843.

Where a legatee interposes the plea of limitations to the final passage of an administrator's account of the payment of the assets of the estate to creditors, no decree or order which the Orphans' Court might pass in the premises, would divest the Courts of law of jurisdiction over the same subject-matter; and the fact of the administrator being a creditor, claimant, does not change the nature of the case.

The plea of limitations, (technically considered as such,) is not applicable to proceedings before the Orphans' Court, in relation to the claims of creditors. That Court may look to the fact of such a bar as evidence to

be weighed with all other testimony, in relation to any claim, in determining its justice, and the propriety of passing or rejecting it. (a)

359 * The right to interpose the plea of limitations to claims against a deceased's estate, before the Orphans' Court, is vested in executors and administrators by our testamentary system.

The fact that the Orphans' Court has endorsed the claim of an administrator against his intestate's estate, to be allowed when paid, will not prevent the residuary legatee from objecting, before the same Court, to the justice of the demand, and requiring full proof of its existence prior to the ratification of the administration accounts, in which he seeks an allowance of his demand as paid. (b)

For want of full proof when demanded, the Orphans' Court may reject any claim against a deceased's estate, after it has been passed and before payment. (c)

After a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor filing a claim, it is competent for the residuary legatee to plead the Act of Limitations.

But as to proceedings at law by a legatee, distributee or creditor, whether competent for them to defeat the claims of creditors of the deceased, by the plea of limitations, this Court intimates no opinion.

The case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, is not in conflict with *Stevenson et al. vs. Shriver and Wife*, 9 G. & J. 324. In the latter case, this Court considered the *prima facie* effect of the order of the Orphans' Court, when passed, as evidence coming in collaterally, while in the former cause, the question was whether the Orphans' Court, acting *de novo*, ought to pass such an order at all.

This Court will not pronounce upon the rights of a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims.

The Orphans' Court passed certain claims against a deceased's estate; when the administrator came to settle his administration account, the claims were objected to, and full proof of them demanded, but the Court allowed them. Upon appeal, this Court reversing the decision of the Orphans' Court, remanded the cause without prejudice, with liberty to take further proof.

APPEAL from the Orphans' Court of Prince George's County. On the 10th December, 1842, the appellee offered for passage his first account as administrator aforesaid, in which he charged himself with \$7,347.75, and claimed an allowance of accounts No. 1 to 41 inclusive, \$4,605.36, leaving a balance due the estate of \$2,742.28.

The appellants on the 25th April, 1843, filed their petition, representing that James Lamar died about the 14th May, 1838, having made his last will and testament, in which he bequeathed to the petitioner, Elizabeth, the wife of the said Richard, and sister of the said James, all his personal property, during * the term of her

360 single life, (the said Elizabeth being then a widow,) and after

(a) Approved in *Yingling vs. Hesson*, 16 Md. 120.

(b) See *Lee vs. Lee*, 6 G. & J. 218, note (b); *Stevenson vs. Schriver*, 9 G. & J. 208.

(c) Approved in *Edelen vs. Edelen*, 11 Md. 419.

her death or marriage the said personal estate was given or bequeathed to Mary E. Childs, the daughter of said Elizabeth, by a former husband, and the niece of the said James, as may be more fully seen by reference to said last will and testament, duly admitted to probat and now of record in this Court, and which your petitioners pray may be taken as a part of this petition; that some time in the month of October, 1841, the appellants were intermarried, by which event the said personal estate became the right and property of the said Mary E. Childs, according to the provisions of the said will, and your petitioners were duly appointed guardians to the said Mary, and as such have given bond and are duly qualified; that a certain Marein T. Lamar has taken out letters of administration, with the will annexed, on the personal estate of the said James Lamar, and possessed himself of the entire personal estate of the said James, but as yet has passed no account whatever with this Court; that they are advised the said M. T. L. has filed in this Court and presented for passage an administration account, in which he claims credits and allowances for a large sum as due to him, the said administrator, from the said testator, James, amounting to the sum of \$1,547.09, or thereabouts, and claims to be allowed by your honorable Court, to retain in his own hands enough of the assets of the said testator to pay the same. The petitioners object, as the guardian of the said M. E. C., to whom the residue of the said personal estate belongs, after the payment of all just debts, to the payment or allowance of said account, claimed as due to him by the said James Lamar, because they charge that the same is unjust, and that the said J. L. is not so indebted, and having no other remedy in a case like the present, except by resort to this Court, submit that the same ought to be rejected; that the claim is barred by the Statute of Limitations, is a stale demand, &c., and they call for full proof thereof. Various other claims in said administration account were also objected to on the same grounds, and full proof demanded. Prayer—that the said claims be rejected.

* The appellee answered the said petition, denied its allegations in a general way, insisted that he had paid the accounts **361** objected to, and offered to produce full proof as may be required, and also denied the right of the petitioners to plead limitations.

After this the appellee produced proof to the Orphans' Court, which need not be more particularly stated, than it is in the opinion of this Court; and on the 25th April, 1843, the objections set forth in the petition were overruled and the account of the appellee was allowed and passed, when this appeal was prosecuted.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

T. F. Bowie, for the appellants.

Alexander and Pratt, for the appellees.

DORSEY, J. delivered the opinion of this Court. All objections to vouchers Nos. 1, 8, 9, 13, 18, and 32, for which credits were allowed Marein T. Lamar, administrator *cum testamento annexo* of James Lamar, in his account settled with the Orphans' Court of Prince George's County, on the 25th of April, in the year 1843, being waived and withdrawn, this Court are only called upon therefore to decide whether the objections taken to vouchers Nos. 4, 10, 39, and 40, were properly overruled by the Orphans' Court. Of all these vouchers or claims the appellee was called upon by the appellants to offer full proof, and to the voucher No. 4 the plea of limitations is interposed as a bar.

In this attitude of the case the first question presented for our determination is, have the appellants the right of preferring such a plea, before the Orphans' Court, in bar of the appellees' claim?

To support the affirmative of this proposition we have been referred to the cases of *Shrewen vs. Vanderhorst*, 1 *Russ. & Mylne*, 347, where after a decree to account, on a bill filed by a residuary legatee

362 against an executor, upon a creditor's filing * a claim, the Lord Chancellor decided that it was competent for the complainant (the residuary legatee) to plead the Statute of Limitations. In delivering his opinion he states that "the question here is, whether, when a decree has been pronounced, taking possession of the estate and vesting it in the Court for the purpose of distribution, a decree by which the accounts are directed to be taken, and the assets are to be administered in the master's office, and after which the common law must be altogether silent," the plea must not be considered fatal! And in the same case, in 2 *Russ. & Mylne*, 75, the Master of the Rolls, who allowed the residuary legatee to plead the Statute of Limitations to the creditor's claim, "stated the ground of his decision to be, that after a decree the executor was not at liberty to do any act which affected the relative rights of creditors." The same reasons do not exist for receiving such a plea, from such a source, in proceedings before the Orphans' Court. No decree or order which the Orphans' Court might pass, in the premises, would divest the Courts of law of jurisdiction over the same subject-matter, nor would it thence follow that the common law must thereafter "be altogether silent;" or, in the language of the Master of the Rolls, would the executor be deprived of the "liberty to do any act, which affected the relative rights of creditors." The grounds upon which the case of *Shrewen vs. Vanderhorst* was decided, being wholly inapplicable to proceedings before the Orphans' Court, can have no influence upon the opinion of this Court in the case now before it. Does the fact of the executor being the creditor, claimant, change the nature of the case? We think it does not. If the appellants can, in their suit at law now pending, in any way, defeat the appellees' claim by a plea of limitations, no decision which the Orphans' Court could have made in the case before it could destroy or impair their power of

doing so. We do not therefore regard the plea of limitations (technically considered as such) applicable to proceedings before the Orphans' Court, in relation to the claims of creditors. That tribunal may, it is true, look to the fact of such a bar as evidence to be weighed with all other testimony in relation to any claim, in *determining on its justice and the propriety of passing or rejecting it; but as a technical statutory bar, no legatee or creditor has in the Orphans' Court authority to interpose it against a creditor's claim, that power, by our testamentary system, being vested in executors and administrators. In what we have said we desire it to be understood that we have intimated no opinion that, in any proceeding at law by a legatee, distributee, or creditor, it is competent for them to defeat the claims of creditors of the deceased by the plea of limitations. **363**

Voucher or claim No. 4, it would appear from the endorsement upon it, had been passed by the Orphans' Court anterior to the objection filed by the appellants to its allowance in the administration account then about to be settled by the appellee before that Court. The appeal in this case being taken to the decree and order overruling the objections in the appellant's petition, and allowing and passing the administration account of the appellee, and not to the order of passage endorsed on voucher No. 4, it is insisted by the appellee that, independently of the proof offered for its establishment and inserted in the record, the order of passage endorsed upon it is *prima facie* evidence of its correctness, and in the absence of all proof to the contrary, fully warranted the decree and order of the Orphans' Court as far as that voucher is concerned. The position thus insisted on is directly in conflict with the decision of this Court in the case of *Lee vs. Lee and Welsh*, 6 G. & J. 316, where the Orphans' Court were called on by the petition of the person interested as residuary legatee to re-examine and adjudicate anew upon a claim of one of two executors, against the deceased, which had been passed by the Court, but remained unpaid. Upon such a review this Court say that the passage of the claim "adds nothing to its intrinsic merits or authenticity, when reviewed, as it was by the Orphans' Court, upon the proceedings before it." That "the claim having been contested before payment, its passage by the Orphans' Court is no evidence of its correctness. It must be supported by testimony substantially sufficient for its establishment before a jury." The case now before us has been brought up on proceedings in no *wise distinguishable from those in the case of *Lee vs. Lee and Welsh*, and can by no ingenuity be withdrawn from the operation of the principles there established. **364**

But it has been asserted by one of the counsel for the appellee that the case of *Lee vs. Lee and Welsh* is in obvious conflict with the case of *Stevenson and al. vs. Shriver and wife*, 9 G. & J. 324, and is overruled by it. After a careful perusal of both the cases we can

discover nothing by which this assertion can be sustained. That part of the Court's opinion, in the latter case, in which it is alleged this inconsistency appears, is where the Court, in discussing the question, whether, where the estate is insufficient for the payment of debts, a creditor has a right to appeal from an order of the Orphans' Court passing a claim of an executor or administrator, says: "Conceding, as is alleged, that the passage of the claim of an executor or administrator, is not conclusive upon a distributee or creditor suing such executor or administrator, and leaves him at liberty to shew the illegality of the allowance thus made; yet it so increases the difficulty of so doing that such an order cannot be said not to impair the rights of a distributee or of a creditor, where the assets of the deceased are inadequate to the payment of debts. The allowance of the claim is *prima facie* evidence of its correctness, and the executor or administrator need offer no further evidence to sustain it. The *onus probandi* is shifted from the executor or administrator to the creditor." These remarks of the Court, in the latter case, are perfectly consistent with its decision in the former, referring to a proceeding in a different tribunal, where the question would be, not whether the Orphans' Court acted correctly in passing the claim, but whether the claim, according to the proofs in the cause, ought to be sustained or enforced in a Court of justice? The order of the Orphans' Court would be offered but as *prima facie* evidence; as such it is the decision of a Court of competent jurisdiction, and must be respected accordingly. It forms no part of the issue in the cause, but coming collaterally in question to the extent to which it is an adjudication, it must be recognized. In the case of *Lee vs. Lee*

365 * and *Welsh*, the very question in issue was, whether the Orphans' Court ought to pass the claim. It was taken up by the Orphans' Court *de novo*, and consequently its judgment should have been formed upon the evidence adduced by the parties litigant, and not upon any opinion it may have theretofore formed or expressed upon the *ex parte* testimony formerly before it. And in accordance with these views, and not in conflict with the case of *Lee vs. Lee and Welsh*, was the case of *Stockett's Executor vs. Jones and Wife*, decided in 10 G. & J. 276.

Does the record present evidence sufficient, in point of fact, to establish the charges in voucher No. 4, and warrant the Orphans' Court in overruling the objection made to their allowance, is our next inquiry? To the admissibility of the testimony offered for this purpose no exception has been taken. That being the case, we think it does satisfactorily establish the first, second, third, fourth, seventh and eighth items of charge in voucher No. 4. But in support of the fifth and sixth charges in that voucher, as appears by the record, no proof having been offered, the Orphans' Court erred in allowing them.

The Orphans' Court also erred in allowing voucher No. 10, the appellee having wholly failed to offer the requisite proof to sustain it. It is true he has exhibited an account, with a receipt upon it, purporting to have been given by or on account of the sheriff of Prince George's County, for the apprehension fee and jail fees of negro Hanson, a slave of Gustavus Lamar, with a portion of whose estate, as the administrator thereof, James Lamar has been charged by the appellants. But no proof has been offered of the execution of the receipt, or that negro Hanson had ever run away or been confined in jail as a runaway.

The Orphans' Court were in error, also, in allowing voucher No. 39, purporting to be an open account of C. C. Hyatt, against the "estate of James Lamar," commencing in June, 1838, and terminating in December, 1840, with a certificate of C. C. Hyatt that it had been settled by Marein T. Lamar. Of this claim there is not to be found in the record one particle of evidence to show that a single article in the account was ever * sold or delivered to anybody. Nor is there any inventory or other proof of the personal **366** property of James Lamar, from which this Court might form even a conjecture that the articles charged were supplies necessarily provided by the administrator, in a due course of administration, for the sustenance, comfort or preservation of the estate confided to his charge.

The total absence of all evidence as to the nature and circumstances of the personal estate of the deceased; or that the articles consumed, for which the credit is claimed, formed any part of it; or what was the property appraised in the inventory which did not belong to him; or to whom it did belong, should have induced the Orphans' Court to disallow voucher No. 40. Without such proof it is impossible for this Court to say that the allowance claimed ought to have been made. In sanctioning such an allowance the Orphans' Court were therefore in error. But is said that no such proof is necessary, because the articles for which a credit is claimed in this voucher being of such a nature as that they must have been consumed in their use by the legatee during her single life, and were therefore her absolute property, the appellants have no right to complain of the allowance which has been made for them. Whether they have a right to complain, or not, this Court will not venture to determine, unless the entire will of the testator, James Lamar, be before it. In *Evans and al. vs. Iglehart and al.*, 6 G. & J. 174, this Court have said, in determining on the rights of a residuary legatee for life with a bequest over to others, that whether the legatee for life "ought to enjoy his (the testator's) personal estate specifically, or to receive nothing more than the interest on its value, is purely a question as to the intention of the testator, in conformity to which his will must be executed, there being no unbending principle of law to control such intention, whether it be in the one way or the other."

To pronounce what, in this respect, was the intention of James Lamar, the testator, upon a record which does not contain his will, cannot be expected of the Court. But even if the will were to be found in the record, and our construction of it be what it may, it could * throw no light upon the question, nor enable us to determine on the propriety of the allowance made to the appellee for property appraised in the inventory which was no part of the personal estate of the testator.

367 We are prepared to ratify and affirm the decree and order of the Orphans' Court, allowing and passing the administration account of the appellee, except the allowances in said account numbered 10, 39 and 40, and the sum of five hundred and thirty-seven dollars and eighty-six cents, being part of allowance number four in said account, and consisting of the fifth and sixth items of charge in voucher No. 4, as to which said excepted allowances and items the said decree and order of the Orphans' Court is hereby reversed, but without prejudice to the rights of the parties in relation thereto. And this cause is to be remanded to the Orphans' Court of Prince George's County, that such further proceedings may be had therein as may be necessary to carry into effect the decree of affirmance in this Court; and that it may take such further evidence in relation to said excepted allowances and items as the parties may see fit to offer; and that the said Court may finally order and decree thereon as the nature of the case may require. As to all costs heretofore incurred in this Court, and in the said Orphans' Court, each party shall pay its own costs.

Decree reversed in part, and cause remanded.

LEVI CHANEY vs. CHARLES SMALLWOOD.—December, 1843.

Parties who take possession of the personal property of infants, and retain and use the same, will be considered in equity as those who enter upon and use their real estate, treated as guardians, and liable to account accordingly. (a)

Where a father died, having in his possession slaves belonging to his children, his widow, as his administratrix, took possession of them, held and claimed them as her own; while the children were minors, she married again, and the retention and use of the property was continued by the second husband and wife, until her death, and by him until the time of the decree. *Held*, that in equity he is only responsible for the conversions and hires accruing after the time of his marriage with the administratrix. (b)

368 * APPEAL from the Court of Chancery. On the 8th April, 1839, Charles Smallwood and Henrietta, his wife, Joseph

(a) See *Drury vs. Conner*, 1 H. & G. 157, note.

(b) Distinguished in *Pfelz vs. Pfelz*, 14 Md. 382.

Smallwood and Matilda, his wife, filed their bill, alleging, that H. and M., whilst they were infants, and before their marriage, became entitled to sundry negroes, which came into the hands of Zephaniah Mitchell, the father of said H. and M.; that after his death, in the year 1820, his widow, Providence Mitchell, was duly appointed guardian to H. and M., and as such, took possession of the said negroes; that in the year 1828, P. intermarried with Levi Chaney, who, in virtue of his marriage, together with the said Providence, as guardian of the said H. and M., continued in possession, and are now in possession of some of said negroes, to wit, &c.; that in the year 1835, L. C. and wife sold some of said negroes, and received payment therefor: some of the said negroes were hired out, and some retained in possession of L. and P. C., before and since their marriage; that they are responsible for their reasonable hires; that H. and M. are now of full age. Prayer for a discovery and an account and delivery up of said negroes; injunction and general relief.

L. C. and wife answered this bill, and alleged, that all the negroes named in the bill are the descendants of a negro woman, slave, named Peggy, of whom the said Zephaniah Mitchell acquired the possession about twenty-five or thirty years ago; that several of the said descendants were born whilst the said Z. M. was so in possession, and that they always were used and held by him as his own absolute property; that at the death of the said Z. M., some of the said negroes were in his possession, and returned sold and accounted for by the said P. M., as the administratrix of the said Z. M.; that subsequently to the said sale, the said negroes became the absolute property of the said P. M., and so remained until her marriage with the said Levi, from which period they have remained the absolute property of the said L. and P. C., except those sold, &c. The answer then set forth the hiring of the negroes, their value, &c.; that many of them were not worth more than their support, &c., and then denied that the female * complainants, or either of them, ever were, in any manner, entitled to, or ever had, possession of **369** the said negroes, or any of them, or that the said P. ever was appointed guardian to the said female complainants, or as such, ever took possession of the said negroes. The answer also relied on the Statute of Limitations as a defence to said bill.

A commission to take proof was then issued by agreement of parties, and a variety of testimony taken, which is sufficiently adverted to in the opinion of this Court.

It however appeared in proof that Matilda was married on the 14th February, 1837, and Henrietta on the 28th July, 1836.

By an account proved on the 28th October, 1829, by Levi Chaney, husband of Providence Mitchell, administratrix of Z. M., before the Orphans' Court of Anne Arundel County, the accountants obtained the following credit "of current money allowed this accountant for negroes Susan, Sarah, Nell, Peg and her child, returned in the

account sales of 17th October, 1825, and not belonging to the deceased estate, and proved to the satisfaction of the Court as the property of M. and H. M., amounting to \$221."

On the 23rd August, 1836, L. C. and wife petitioned the Orphans' Court for permission to correct their account of October, 1829, and to be re-charged with the said negroes as the property of Z. M., which was so ordered, and an account on that basis was passed and sworn to.

On the 23rd March, 1842, the Chancellor [BLAND] decreed, "that the defendant, Levi Chaney, forthwith deliver up unto the plaintiffs, Charles Smallwood and Henrietta, his wife, and Joseph Smallwood and Matilda, his wife, the negro woman slave Peggy, and her children and descendants or increase, in the bill of complaint mentioned, and which, or any of them, are now in the possession or under the control of the said defendant. And also, that the defendant, Levi Chaney, account with the said plaintiffs of and concerning the hires and profits of all and each one of the said negro slaves, which may have come into the hands and been in the possession of the said Levi Chaney and the late Providence, his wife, or

370 either of them, * from the death of the said Zephaniah Mitchell until the delivery of the said negro slaves unto the said plaintiffs, as hereinbefore directed; and, moreover, that the said Levi Chaney account with the said plaintiffs of and concerning the full value of the said negro slaves, or any of them, which have been sold or disposed of and not delivered as hereinbefore directed. And this case is hereby referred to the auditor with directions to state an account accordingly from the pleadings and proofs now in the case, and such other proofs as may be laid before him. And the parties are hereby authorized to take testimony in relation to the said account before any justice of the peace, on giving three days notice as usual: provided, that such testimony be taken and filed in the Chancery office, in this case, within one month after the delivery of the said slaves as hereinbefore directed."

From which decree Levi Chaney appealed.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ.

Randall, for the appellant. *Alexander*, for the appellee.

SPENCE, J., delivered the opinion of this Court. Of the questions raised in this cause, the first of which we shall attempt to dispose of, is that of jurisdiction.

This Court in *Drury vs. Conner*, 1 H. & G. 220, decided that "whoever enters upon the estate of an infant is considered in equity as entering as guardian for such infants, and after the infant comes of age he may, by bill in Chancery, recover the rents and profits. And if a person so entering shall continue the possession after the

infant comes of age, Chancery will decree an account against him as guardian, and carry on such account after the infancy is determined." And this doctrine is sanctioned and maintained by the cases of *Burnett vs. Whitehead*, 2 P. Wms. 645; *Morgan vs. Morgan*, 1 Atkins, 489; and *Dormer vs. Fortescue*, 3 Atkins, 130. We cannot distinguish in principle the case now before us * from that of *Drury vs.*

Conner. The bill in this case charges that when the com- 371 plainants were infants the respondent took possession of the negroes in controversy and held and received the profits of them up to the time of filing the bill. We are unable to discover any sound reason to exclude the jurisdiction of Courts of equity from affording similar relief in relation to personal estate, as it is adjudged they have in regard to the rents and profits of real estate, where infants are the parties complainants in both cases. Believing that there is no such distinction, we determine that Courts of equity have jurisdiction in such cases.

The next question is as to the right of property. The testimony is obscured by the clouds which are thrown over the characters of some of the witnesses by impeachment, but we think there remains enough untarnished to satisfy our judgments conclusively that the negroes mentioned in the proceedings belong to the complainants. The circumstances and facts of the case, the declarations of Chaney, and especially his acts in the Orphans' Court of Anne Arundel County, might satisfy any impartial mind, that these negroes were the property of the complainants.

The admissions of Chaney are abundantly sufficient to take the case out of the Statute of Limitations.

We think the Chancellor erred in decreeing the defendant, Levi Chaney, to account with the plaintiffs for the hire and profits of the negro slaves from the time the same came into the possession of Levi Chaney, and the late Providence, his wife, or either of them.

This Court therefore reverse this decree in this particular, and will sign a decree that the said Levi Chaney account for the hire and profits of the negro slaves from the time said Chaney intermarried with Providence Mitchell.

Decree reversed in part.

* *IGNATIUS BOARMAN vs. HENRY PATTERSON and FIEL- 372*
DER ISRAEL, Executors of HENRY PETERS.—December, 1843.

After a judgment of condemnation has been rendered in an attachment cause, if the defendant desire to move to quash the writ, regularly he should first move to strike out the judgment, and then make his motion to quash.

- Without the short note showing the plaintiffs' cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in an attachment would be wholly irregular. (a)
- Nothing ought to be recovered by a condemnation of the property attached, which was not recoverable from the defendant, had he given special bail, and appeared to the process issued against him.
- Where the short note states a cause of action in assumpsit, and the writ issued was in trespass upon the case, matters for which debt or covenant was the only remedy could not be recovered.
- A short note cannot be amended from assumpsit, to debt or covenant, where the writ is in trespass upon the case.
- It is no ground for quashing an attachment that some specific portions of the claim as made could not be recovered under the short note. (b)
- Where the creditor deposes "that he is credibly informed, and verily believes, that the said J. B. (the debtor) has removed from his place of abode with intent to injure and defraud his creditors," this is a sufficient compliance with the Act of 1795, ch. 56, sec. 1, in that particular. (c)
- A judgment on attachment which not only condemns property towards satisfying that portion of a plaintiff's demand which might be recovered under the short note, but also to satisfy that which could not be so recovered, is erroneous.
- Where the plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the County Court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances.
- But this Court will not reverse a judgment of condemnation in an attachment cause upon an appeal from such judgment, for such error because it does not appear to have been presented to the consideration of the County Court. (d)
- Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by Act of Assembly on any tribunal, its powers to act as it has done must appear upon the face of its proceedings. (e)
- When those proceedings are brought for review in this Court, it must appear from their inspection, that everything has been done which the law required, as the basis of the authority which has been exercised. (f)
- The Act of 1825, ch. 117, interposes no obstructions to enquiries into such a subject. It has no application to them.
- If there be an error in the attachment proceedings, by reason of which the jurisdiction of the Court does not appear, it would, after verdict, be a fatal objection on a motion in arrest, or, without raising the objection below, it might be assigned as error in the Court of Appeals. (g)

(a) Cited in *Spear vs. Griffin*, 23 Md. 429. See *Burr vs. Perry*, 3 Gill, 323.

(b) Cited in *White vs. Solomonsky*, 30 Md. 589.

(c) Cited in *Franklin vs. Clafin*, 49 Md. 37, as to what is a sufficient statement of the jurisdictional fact of non-residence.

(d) Cited in *Schleigh vs. Hagerstown Bank*, 4 Gill, 312, and *Ecker vs. First Nat. Bank*, Court of Appeals, October, 1884.

(e) Approved in *Risewick vs. Davis*, 19 Md. 91.

(f) Approved in *Mears vs. Adreon*, 31 Md. 234.

(g) Approved in *Dickinson vs. Barnes*, 3 Gill, 492; *Mayer vs. Soyester*, 30 Md. 408; *White vs. Solomonsky*, 30 Md. 588; *Mears vs. Adreon*, 31 Md. 235;

What is a sufficient return by the sheriff to an attachment. (h)

* Under the Act of 1795, ch. 56, sec. 1, unless the affidavit of the creditor contain an averment of citizenship as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue. **373**

The Act of 1834, ch. 76, sec. 1, dispensed with the averment of citizenship of the plaintiff; provided, that if any trial take place it be proved that the plaintiff or plaintiffs, or any of them, at the time of issuing the attachment was or were a resident or inhabitant, or residents or inhabitants, of one of the United States of America, or of a District or Territory thereof. (i)

But where the affidavit is designed to procure a warrant for an attachment against the effects of an absconding debtor, under the Act of 1795, and does not contain an averment of his citizenship of Maryland, it is substantially defective; and upon an appeal from a judgment of condemnation rendered upon it, without a motion to that effect in the County Court, the judgment will be reversed and the attachment quashed.

APPEAL from Baltimore County Court. This was an attachment to compel an appearance, commenced on the 15th January, 1841, on the following proofs and proceedings, to wit:

"*State of Maryland, City of Baltimore, to wit:* Be it remembered, that on the fifteenth day of January, in the year one thousand eight hundred and forty-one, before me, the subscriber, a justice of the peace of the State of Maryland, in and for said city, personally appeared Fielder Israel, a citizen of the State of Maryland, and made oath on the Holy Evangely of Almighty God, that Ignatius Boarman, late of Baltimore County, is justly and *bona fide* indebted unto him, the said Fielder Israel and Henry Patterson, executors of Henry Peters, late of said county, deceased, in the sum of three thousand two hundred and fourteen dollars twenty-eight cents, over and above all discounts. And at the same time the said Fielder Israel produced to me an account, with sundry notes, bills and obligations, on and by which the said Ignatius Boarman is so indebted, which are hereto annexed; and the said Fielder Israel did also make oath, that he is credibly informed and verily believes, that the said

Coward vs. Dillinger, 56 Md. 61; *Hoffman vs. Reed*, 57 Md. 376. See also *Bruce vs. Cook*, 6 G. & J. 281. On a motion to quash an attachment the Court of Appeals is not confined to the consideration of the particular objections which may appear by the record to have been urged in the Court below; but if the proceedings brought up for review appear on their face fatally defective, the motion must prevail. *Mayer vs. Soyester*. Objection to attachment proceedings on the ground that they do not upon their face show affirmatively that the requirements of the statute have been substantially complied with, may be made on a motion to quash, on a motion in arrest of judgment after verdict, or, without making it in the Court below, may be availed of on appeal. *Coward vs. Dillinger*.

(h) Cited in *McCoy vs. Boyle*, 10 Md. 386.

(i) Cited in *McCoy vs. Boyle*, 10 Md. 396.

Ignatius Boarman has removed from his place of abode, with intent to injure and defraud his creditors.

"Sworn before T. Hanson Belt, a justice of the peace of the State of Maryland, in and for the City of Baltimore."

374 * "*Ignatius Boarman to Henry Patterson and Fielder Israel, executors of Henry Peters, deceased.*"

To your note dated 1st of March, 1836, for.....	\$ 400 00	
Interest thereon from 1st September, 1837.....	80 80	
		\$ 480 80
To your due bill, dated 26th March, 1836, for.....	375 00	
Interest thereon from 1st September, 1837.....	75 75	
		450 75
To your note dated 6th November, 1835, for.....	1,000 00	
Interest thereon from 1st September, 1837.....	202 00	
		1,202 00
To your note under seal, dated 12th May, 1827, for	800 00	
By cash.....	350 00	
		450 00
Interest thereon from 1st September, 1837.....	90 90	
		540 90
To your obligation and receipts, dated 27th March, 1827	400 00	
Interest thereon from 1st September, 1837.....	80 80	
		480 80
To your due bill dated 9th January, 1838.....	50 00	
Interest thereon from date.....	9 03	
		59 03
		\$3,214 28

N. B.—Interest calculated to 13th January, 1841."

"\$400. Baltimore, March 1st, 1836. Twelve months after date, I promise to pay Henry Peters, or order, four hundred dollars, for value received, with interest. IGNATIUS BOARMAN."

"375. Baltimore, May 26th, 1836. Balance due Henry Peters, on a note I have for collection on the C. Nuns, in Old Town, three hundred and seventy-five dollars, principal and interest. IGNATIUS BOARMAN."

"1,000. Baltimore, November 6th, 1835. Twelve months after date, I promise to — Henry Peters, or order, one thousand dollars, for value received. IGNATIUS BOARMAN."

* "Baltimore, May 12th, 1837. On this first day of September, eighteen hundred and thirty-one, I promise to pay Henry Peters, or order, the sum of eight hundred dollars, with legal interest thereon, commencing on the first of September next, payable

half-yearly, for value received, the first half years' interest becomes due on the first day of March, eighteen hundred and twenty-eight.

IGNATIUS BOARMAN. [Seal.]"

Witness,—Thomas Moore.

(Endorsed.) "350. Baltimore, Nov. 20th, 1829. Paid three hundred and fifty dollars on the within bond, and interest on the said three hundred dollars, and interest on the balance up to the first of September last, for which Boarman has a receipt. 800=350—450 balance due."

The plaintiff also exhibited as a part of his claim a covenant under the seal of the said I. B., by which Peters agreed to lease him a lot, and B. to build two houses thereon, with receipts endorsed thereon by B. for \$400.

"To the clerk of Baltimore County Court: Mr. Kell, you are hereby required, on receipt of this warrant and the above oath and annexed vouchers on which the same is granted, to issue an attachment against the lands, tenements, goods, chattels and credits of the said Ignatius Boarman, to answer unto the said Fielder Israel and Henry Patterson, executors of Henry Peters, deceased, the above mentioned sum of three thousand two hundred and fourteen dollars twenty-eight cents, current money, and cost of this attachment, according to the Acts of Assembly in such case made and provided; and this warrant shall be your sufficient authority therefor. Given under my hand and seal this fifteenth day of January, in the year eighteen hundred and forty-one.

"T. HANSON BELT, [Seal.]

"Justice of the Peace in and for the City of Baltimore."

Thereupon the said Henry Patterson and Fielder Israel, &c. prosecuted out of the County Court here, the writ of attachment, in form following, to wit:

"The State of Maryland, to the sheriff of Baltimore County, greeting: Whereas, Thomas Hanson Belt, Esquire, one of the justices of the peace for Baltimore City, hath this day issued
 * his warrant to the clerk of said county, directing him to **376**
 issue attachment against the lands, tenements, goods, chattels and credits of Ignatius Boarman, to answer unto Fielder Israel and Henry Patterson, executors of Henry Peters, deceased, the sum of three thousand two hundred and fourteen dollars twenty-eight cents: We therefore command you, that you attach the lands, &c., to the value of three thousand two hundred and fourteen dollars twenty-eight cents, current money, and cost of this attachment, according to the form of the Act of Assembly in such case made and provided. And we further command you, that by, &c., &c. Issued the 15th day of Jan. 1841.

THOMAS KELL, Clerk."

The plaintiffs also sued out a writ of trespass upon the case, against the said I. B., and filed the following short note, to wit:

"Fielder Israel and Henry Patterson, executors of Henry Peters, against Ignatius Boarman, action of assumpsit in Baltimore County Court.

"This suit is instituted to recover the sum of three thousand two hundred and fourteen dollars twenty-eight cents, due and owing from the defendant to the plaintiffs, as executors of Henry Peters, deceased, on a note of defendant for \$400, dated 1st March, 1836, payable to said deceased, twelve months after date; on another note of defendant for \$1,000, payable to said deceased twelve months after date; on a due bill of defendant for \$375, dated 26th May, 1836; on another due bill for \$50, dated 9th Jan. 1838; on a single bill of defendant to deceased for \$800, payable on the first September, 1831, dated 12th May, 1827; and, on the obligation and receipt of defendant to deceased for \$400, payable 1st September, 1832, with interest thereon.

J. PENNINGTON, Plaintiff's Att'y."

The sheriff returned the attachment, to wit:

"Laid in the hands of William J. Boarman and Ignatius Boarman, Junior, the 21st of January, 1841, in the presence of Samuel B. Hiser and John Gallagher, and attached as per schedule.

"WILLIAM D. BALL, Sheriff."

Which said schedule is in form following, to wit:

377 * "A schedule of the goods and chattels, lands and tenements of Ignatius Boarman, seized and taken at the suit of Fielder Israel and Henry Patterson, executors of Henry Peters, by virtue of a writ of attachment issued out of Baltimore County Court, to the sheriff thereof directed, and appraised by us, the subscribers, who first being duly summoned and sworn for that purpose. Given under our hands and seals, this 20th day of January, 1841.

"1 lot of ground fronting on the south side of Little Hughes," &c., &c.

And the sheriff aforesaid also makes return to the Court here, of the said last mentioned writ, thus endorsed, to wit: "N. E., copy set up."

Neither the defendant, I. B., nor the garnishee appearing, upon the prayer of the plaintiff: "Therefore it is considered by the Court here, that the lands and tenements aforesaid, of the said Ignatius Boarman, so as aforesaid attached, be condemned according to the Act of Assembly in such case made and provided, towards satisfying unto the said Henry Patterson and Fielder Israel, executors as aforesaid, as well the sum of three thousand two hundred and fourteen dollars and twenty-eight cents, current money, in the writ of attachment aforesaid specified, with interest from the fifteenth day of January, eighteen hundred and forty-one, as the sum of thirteen dollars eighty-six and two third cents, by the Court here, unto the said Henry Patterson and Fielder Israel, executors as aforesaid, on their assent adjudged, for their costs and charges by them, about their suit, in this behalf expended."

Whereupon at the same term comes into Court here, the said Ignatius Boarman, by, &c., and moves the Court here, to quash the writ of attachment aforesaid, and files in Court here, in said cause, the following motion and reasons, to wit:

1st. Because in the said suit are embraced different pretended causes of action, some of which ought to have been sued upon in assumpsit, and others thereof in debt, and one thereof in covenant.

*2nd. Because the sum of money claimed to be due from the defendant to the plaintiffs, for which said attachment 378 issued, is composed of various amounts mentioned in several promissory notes, due bills and single bills, and one action of assumpsit was brought thereon, embracing the whole pretended claim.

3rd. Because causes of action of a different nature are embraced in the said attachment, and together compose the amount claimed in the said attachment, as due from the defendant to the plaintiffs.

4th. Because the said attachment and the proceedings in the said case, are otherwise, and in other respects, informal and invalid.

The defendant, as an additional reason for quashing the attachment in this cause, urges: That the proceedings do not disclose upon their face a compliance with the requisites of the Act, in this, that they do not aver the defendant has actually run away, absconded or fled from justice, or secretly removed himself or herself, from his place of abode, with intent to evade the payment of his just debts.

The motion to quash being overruled by the County Court, the defendant prayed an appeal from the judgment of condemnation and from the overruling his motion to quash the attachment.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

T. P. Scott, for the appellant. *William F. Frick*, for the appellees.

DORSEY, J. delivered the opinion of this Court. We cannot say the County Court erred in overruling the motion, there made, to quash the attachment. The appellant never appeared, or made such motion, until after the judgment of condemnation was rendered by the Court. Instead therefore of an application to quash the writ of attachment, his motion should have been first to strike out the judgment, and then to quash the attachment. Until the judgment was *stricken out the Court could, with no consistency, be asked 379 to quash the writ of attachment, upon which it was founded. But waiving this objection to the regularity of the appellant's motion, let us enquire whether the reasons assigned by him were such as would have justified the Court in gratifying his request?

The first reason assigned as a ground for quashing the attachment, is that "in the suit are embraced different causes of action, some of which ought to have been sued upon in assumpsit, and other thereof in debt, and one thereof in covenant." The decision of this

Court, in the case of *Dawson vs. Brown*, 12 G. & J. 53, is decisive upon this point. It is there decided that it is not necessary that a creditor should recover the whole amount of his claim for which the attachment issued. The attachment may be good and available to him for a part of his claim, though wholly unavailable as to the residue. Without the short note showing the plaintiff's cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in the attachment would be wholly irregular. Nothing ought to be recovered by a condemnation of the property attached, which was not recoverable from the defendant, had he given special bail and appeared to the process issued against him. The short note states the cause of action to be in *assumpsit*, and the writ issued was in trespass on the case. For all that part of the appellee's claim, therefore, for the recovery of which an action of debt or covenant was the only remedy, the present proceedings in attachment furnished no remedy. Their short note or declaration, by no amendment which could have been made to it, could be made to embrace claims recoverable only in debt or covenant. It must conform to the writ; of which there could be no amendment, changing the nature of the action. No portion of the claim of the appellees was recoverable under the proceedings before us, except that for which an action of *assumpsit* was the appropriate remedy. To this extent the appellees were entitled to recover, and consequently the County Court could not, for the reason assigned, have quashed *the writ of attachment, no matter at what stage of the proceedings the motion for that purpose might have been made.

The second and third reasons assigned for quashing the attachment are but reiterations of the first, and consequently are disposed of by the views we have hereinbefore expressed. The fourth reason is so vague and indefinite, that it presents no point which this Court are enabled to say, was determined by the Court below, and for that vagueness and uncertainty was properly overruled by it, and regarded as a nullity. The additional reason, which was filed for quashing the attachment, was in these words: "That the proceedings do not disclose upon their face a compliance with the requisites of the Act, in this, that they do not aver the defendant had actually runaway, absconded, or fled from justice, or secretly removed himself or herself, from his place of abode, with intent to evade the payment of his just debts." It is true that the affidavit in the case before us contains no such averment, but it is equally true that such an averment is not an indispensable requisition to the issuing of an attachment. The provision of the Act of Assembly has been, in this respect, if not to the letter, at least substantially complied with. The creditor has sworn "that he is credibly informed, and verily believes, that the said Ignatius Boarman, (the debtor,) has removed from his place of abode, with intent to injure and de-

fraud his creditors." Which is all that the Act of Assembly in that respect requires.

Had the reasons assigned in the County Court, for quashing the attachment, been preferred in the most appropriate stage of the cause, we see nothing in the specific grounds relied on in the motion that could have sustained it. The County Court therefore committed no error in overruling it. But the present appeal is not only taken to the order of the Court, overruling the motion, but to the judgment of condemnation which has been rendered in the cause. For the reversal of this judgment we see in the record sufficient grounds, if in accordance with the Act of 1825, ch. 117, it sufficiently appeared, that the County Court had before entering the judgment, or subsequently on a motion to strike it out or amend it, (had such motion been made,) decided upon the sufficiency of those grounds.

This judgment we think erroneous because it condemned the **381** property attached not only towards satisfying that portion of the appellees' claim which was recoverable in an action of assumpsit, but also that portion thereof which could only have been recovered in an action of debt or covenant. And waiving this error, it was also erroneous because it added the interest to the principal on all the claims up to the fifteenth day of January, 1841, and from that time awarded interest to be paid on the gross sum so ascertained. Thus compounding the interest, or charging the appellant with the payment of interest upon interest, a charge, in proceedings like the present, not warranted by any Act of Assembly or principle of law of which we are apprised. But for these errors, we are not at liberty to reverse the judgment, it not appearing that they were presented to the consideration of the County Court, or that it made any decision in relation thereto. *Sasser vs. Walker, Ex'rs*, 5 G. & J. 102.

The appellant, however, claims a reversal of the judgment before us, for other reasons than those we have mentioned; First, "because there is no averment of the citizenship of Patterson, one of the plaintiffs;" and, secondly, "because there is no averment of the citizenship of the defendant." These points were not raised in the Court below, nor does it appear that they were considered or determined by it. Nevertheless, notwithstanding the Act of 1825, they are, in this case, fit subjects for review in this Court. Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by Act of Assembly on any tribunal, its power to act, as it has done, must appear upon the face of its proceedings. And when those proceedings are brought up for review in this Court, it must appear from their inspection, that every thing has been done which the law required as the basis of the authority that has been exercised. To our enquiries into such a subject the Act of 1825 interposes no obstructions; it has no application to them. That such is the doctrine of this Court in relation to the two defects

now under consideration * we think fully appears by the case of
382 *Bruce and Fisher vs. Cook, Garnishee of Scarborough*, 6 G. & J. 348—where, in the Court's opinion, it is said, that if there be error in the proceedings on which an attachment had issued, by reason of which the jurisdiction of the Court did not appear, "it would have been a fatal objection after verdict on a motion in arrest in judgment." That the garnishees "might have taken advantage of it, if a jury had been sworn, by a prayer for the instruction of the Court; or, after verdict and judgment against them, without raising the objection below, it might, on appeal or writ of error, have been assigned as error here, and this Court would have taken notice of and sustained it." To show the materiality of the omissions here complained of, it is only necessary to refer to the Act of 1795, ch. 56, sec. 1; under which, unless the affidavit contain such averment of citizenship, as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue; no judgment of condemnation can be rendered by the County Court. Those facts not appearing in the affidavit, neither the magistrate who issued the warrant, nor the County Court, have any jurisdiction over the subject-matter: the whole proceedings would be irregular and ought to be quashed. So stood the law under the Act of 1795. But by the Act of 1834, ch. 76, sec. 1, it is enacted "that no attachment that shall hereafter be issued by virtue of the Act to which this is a supplement or of any of the supplements thereto, shall fail, be dismissed, quashed or defeated, because of any defect in any averment, as to the citizenship or residence or inhabitancy of the plaintiff or plaintiffs or any of them, or because of any omission altogether of averment in that respect in the affidavit for such attachment, or in any act or any part of the proceedings preliminary to such issuing of attachment; provided that if any trial take place it be proved at the trial in such attachment case that the plaintiff or plaintiffs, or any of them, at the time of issuing said attachment, was or were a resident or inhabitant or residents or inhabitants of one of the United States of America, or of a District or Territory thereof." By this Act of
383 Assembly, under * the circumstances in which this case stands before us, we think the appellant cannot claim a reversal of the judgment, or that the proceedings on which it is founded be quashed, by reason of the omission of the averment of citizenship as to one of the plaintiffs. The design of this Act of Assembly was to protect plaintiffs from the effects of omissions enumerated until a trial should take place, at which the omission complained of could be supplied by proof. The infirmity in the affidavit, as to the citizenship of the defendant, remains unhealed by any legislative Act, and compels us to reverse the judgment of the County Court, and to quash the writ of attachment on which it is founded.

Judgment reversed, and attachment quashed.

ANDREW HALL and Wife vs. CHARLOTTE HALL and others.
December, 1843.

It is a general rule that, if the answer to a bill denies the existence of any parol contract for the sale of lands, and insists upon the benefit of the Statute of Frauds, the case cannot be made out by parol proof, and the bar of the statute is complete; but there is an exception to this rule, resulting from a part performance of the contract, established by many decided cases. (a)

The evidence of part performance of a parol contract for the sale of lands, in the delivery of possession, or payment of purchase money, need not be in writing, where such evidence is admissible as acts of part performance, to take a case out of the Statute of Frauds. (b)

The Statute of Frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part performance, of things done in execution of the agreement.

Where a complainant relies upon acts of part performance, to take a parol agreement for the sale of lands, (denied by the answers,) out of the operation of the Statute of Frauds, it is his duty to offer full and satisfactory evidence of the terms of such agreement, and of the performance of it on his part, to entitle him to a decree for specific execution. (c)

APPEAL from the Court of Chancery. The amended and supplemental bill in this cause was filed on the 6th July, 1836, by the appellants, and alleged that in the year 1815, Aquila Hall died, having executed his last will, * whereby he devised to his widow, Ann Hall, for life, a valuable real estate and some 384 personal property; after the decease of his wife, remainder to his daughters, Charlotte and Maria Hall, in fee. The will also contained various devises of specific parcels of real property to his children respectively, except Delia, who had intermarried with a certain Philip Moore, and his son, Edward C. Hall; and to Delia Moore he devised \$5,000 out of certain real estate directed by his will to be sold, and the residue of the money arising from such sale to be applied to the use of his son Edward C. Hall. A copy of the will was exhibited with the bill of complaint.

The bill then alleged, that the real estate, when sold produced nothing for Edward, who was in fact left unprovided for, and that in order to equalize the bequests of said testator, and to prevent an entire failure of his intentions, and wishes in respect to the said Edward, and his mother, the said Ann Hall, and his sisters, the said Charlotte and the said Maria, to whom the largest and most valuable parts of the testator's estate were devised, agreed to give, and

(a) Cited in *Semmes vs. Worthington*, 38 Md. 327; *Small vs. Owings*, 1 Md. Ch. 387. See *Moale vs. Buchanan*, 11 G. & J. 209, note.

(b) Cited in *Bowie vs. Bowie*, 1 Md. 95.

(c) Approved in *Small vs. Owings*, 1 Md. Ch. 370.

did give, to him the said Edward, the lands and premises particularly mentioned and described in the original bill in this cause, and placed him in possession thereof as the absolute owner in fee; that the said Edward had in actual possession, used, enjoyed and claimed as sole owner, for many years, the said land and premises, under and in virtue of the said gift, and that while he was so possessed thereof and holding himself out to the public as the absolute proprietor, to wit, during the year 1825, he sold the lands and premises to the said Philip Moore, for a valuable consideration, to wit, \$4,000, and received from the said P. M., at various times, the whole amount of purchase money; and the complainants charged that the said sale was made with the knowledge, acquiescence and assent of the said Ann, Charlotte and Maria, and that they were apprised of the consideration and payment of the purchase money by said Moore, and acquiesced in the same; in the year 1825 the said E. C. H. transferred on the public records of the Levy Court or commissioners of Baltimore County the said lands and premises to P. M., and **385** that * the said Moore had before been and was then placed in the quiet possession of the said estate, and always afterwards, up to the period of his decease, continued peaceably to possess and enjoy the same, and to pay all the county taxes and assessments thereon; and they expressly charge that at no time during the said possession of said estate by said Edward, or at the time he transferred the possession thereof to the said Moore, or afterwards, during the life of the said Moore, did either the said A. C. or M., or either of them, ever claim the said estate, or pretend to have any title thereto, or in any manner question the validity of the said P. M.'s purchase, but on the contrary the said A. C. and M. all promised and agreed to convey the said estate to the said P. M. The bill then proceeded to allege various other circumstances, resting on parol proof, by which the title of the said P. M. had been virtually admitted by the defendants, and alleged his death intestate, the wife of the complainant Andrew, being his only child. The bill prayed for a discovery and conveyance from the appellees, and for general relief.

The answer of Charlotte and Maria Hall, denied that they, or either of them, or Ann Hall, their mother, ever gave, or agreed to give, the said lands and premises to the said Edward C. Hall, with the views alleged in the bill, or "on any account whatever," or that they ever placed him in possession as absolute owner; that he never held or owned the lands in that character, nor claimed them as, or held himself out to be, absolute owner thereof. They deny that he ever attempted to sell, or sold, the said lands to P. M., or that the said P. M. ever paid him any money on that account. The answer also denied knowledge, assent or acquiescence, as imputed to them in the bill. They allege that E. C. H. had only possession for two years as tenant of Ann Hall, upon whose death the possession of

the said lands vested in these defendants, and has so continued ever since. The answer also denied any agreement to convey to P. M., or that he was ever in possession, with their consent.

* The answer of Edward C. Hall, corresponded in substance with the answers of his sisters C. and M. **386**

On the 21st April, 1842, the Chancellor, [BLAND,] after much testimony taken, on which the cause had been argued before him by the defendants, being of opinion that there was "no proof of any written agreement, nor any evidence of an adequate part performance of any parol contract for the conveyance of the real estate in the proceedings mentioned from the defendants, or any of them, to the ancestor of the plaintiff, Ann G. Hall," decreed that the bill be dismissed with costs.

From this decree the complainants appealed to this Court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

N. Williams, for the appellants.

W. Schley and *R. N. Martin*, for the appellees.

DORSEY, J., delivered the opinion of this Court. The first point relied on by the appellees is not disputed, and on an inspection of the record, is a self-evident proposition. It simply asserts, "that there is no proof of any written agreement for the conveyance of the real estate, mentioned in the said proceedings, by the appellees to Philip Moore, the ancestor of Ann G. Hall, one of the appellants."

The second point on which one of the solicitors of the appellees has very confidently relied is, "that the existence of any parol agreement for the conveyance of the said estate, as alleged in the bill of the appellants, being denied by the appellees in their answer to the said bill, and the appellees having insisted on the benefit of the Statute of Frauds, the statute constitutes a complete bar to the relief prayed for by the bill, and that it was not competent for the appellants to make out a case by parol evidence."

To sustain this proposition, which if sustainable, would interpose an insuperable bar to the relief sought by the bill, several authorities have been cited; but that most strongly pressed upon the Court, the general rule upon the subject, stated by * *Justice Story* in the 2nd vol. of his *Equity Jurisprudence*, 60, sec. 758, where, **387** in speaking of the validity, in a Court of equity, of a parol agreement for the sale of land, &c., under the 4th sec. of the Statute of Frauds, he says, "it follows from what has been already said, that if the answer denies the existence of any parol contract, and insists upon the benefit of the statute, the case cannot be made out by parol evidence; and that the bar is complete." In thus stating a general rule applicable to the operation of the statute, to impute to

the learned commentator a design to overrule all the cases that established an exception to the rule resulting from a part performance of the contract, would be doing him great injustice. Such exception being upon authority as universally recognized and sanctioned as the general rule which he so clearly announced. And that such was not his meaning and intention, is obvious from his succeeding section, (No. 759,) which he commences by saying: "In the next place, Courts of equity will enforce a specific performance of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which Courts of equity interfere in cases of this sort, is that, otherwise one party would be enabled to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit a fraud upon another with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted instead of being suppressed by such a jurisdiction for discovery and relief." Upon all principles of fair construction, therefore, the reverse of the doctrine contended for as aforesaid, by one of the solicitors of the appellees, is established by the sections of the *Commentaries of Justice Story*, to which we have referred. And no support whatever is given to the position thus insisted on for the appellees, by any of the authorities referred to as sustaining it, unless it be the case of *Givens vs. Calder*, 2 *Desaussure*, 190; to the doctrines of which case, (as applicable to the case before us,) if rightly interpreted by the solicitor of the appellees, we announce our unqualified dissent, regarding

388 * them as in conflict with all the established adjudications upon the subject. In the case of *Givens vs. Calder*, the vendor and vendee were dead, and the complainants were the contracting agent of the vendee and his wife, who was the residuary devisee of the purchaser. The respondent, the heir of the vendor, did not deny the agreement alleged, but his knowledge of it, or the assent of the vendor to the delivery of the possession, and says he therefore cannot admit it and pleads the Statute of Frauds. Chancellor Rutledge, who delivered the opinion of the Court, says: "we are clearly of opinion, that in the case of a parol agreement, not tainted with fraud, if the defendant chooses to avail himself of the statute, it is not necessary that he should by answer confess or deny the agreement, the law having declared it void. Neither ought he be compelled to confess or deny part performance of it, although charged in the bill. That to permit parol evidence of a parol agreement, would be in effect to repeal the statute, and introduce all the mischief, inconvenience and uncertainty it intended to prevent. That to admit parol proof of part performance of a parol agreement would be equally improper, and is not warranted by any of the cases in the books; for it is clearly held, that if the part performance alleged, be possession of land or the payment of money, the complainant

must prove delivery of possession in the first case, or receipt or written evidence of payment in the other, to entitle him to a specific execution of the agreement. All the parol testimony, therefore, which has been adduced in the case to prove the parol agreement, or the part performance of it, is made inadmissible, and must be laid aside." "The case thus standing without proof on the part of complainant, the facts of part performance, namely, payment of part of the purchase money, and delivery of possession not being admitted but denied by the answer as fully and explicitly as defendant could do so, the bill must be dismissed with costs."

If in this opinion the Court meant to assert, that by the Statute of Frauds the evidence of part performance of a parol contract, in the delivery of possession or payment of the purchase money must be in writing, to such an assertion we cannot * yield our assent.

From the very nature of the act of delivering possession, written evidence of it rarely, if ever, exists. It is in its nature a matter *in pais*, of which written evidence is not to be predicated. The admission or denial by the answer, of the acts of part performance, does not affect or in any wise change the statutory bar to the relief prayed. The statute was designed to exclude oral evidence of the agreement of sale, not oral evidence of the acts of part performance or things done in execution of the agreement. The payment of the purchase money stipulated by the contract may be proved by oral testimony, as well where the agreement is reduced to writing, as where it rests wholly in parol. In reference to the proof, by which such payments are to be established, the statute referred to has made no provision. The same may be said of the act of part performance, by the delivery of possession, or of the expenditures made, or improvements erected in virtue of the agreement. 389

To refer to authorities to shew that Courts of equity will decree the specific performances of an oral agreement, on the ground of part performance, may well be regarded at this day as an useless waste of time; but as the contrary doctrine, as applicable to the circumstances of the case, has been so confidently urged by one of the solicitors of the appellee, it may not be out of place, perhaps to advert to a few of such authorities. 1 *Fonb. Eq.*, ch. 3, s. 8, 153, in commenting on the statute and the decreeing of the specific execution of verbal contracts, states that, "so if it be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is performance the evidence of the bargain does not lie merely upon the words, but upon the fact performed, and it is unconscionable that the party that has received the advantage should be admitted to say, that such contract was never made."

In *Roberts on Frauds*, 131, it is stated, that the relief against the statute in the cases of part performance was originally founded on fraud.

390 * In *Phillips vs. Thompson*, 1 *John C. C.* 132, Chancellor Kent says, "the ground of the interference of the Court is not simply that there is proof of the existence of a parol agreement, but that there is fraud in resisting the completion of an agreement partly performed;" and in *Hamilton vs. Jones*, 3 *G. & J.* 127, this Court have said, "the ground upon which Chancery interposes its aid, in the case of a clear part performance of a verbal agreement, is, that to withhold relief would be to suffer a party seeking to shelter himself under the Statute of Frauds, himself to commit a fraud."

This doctrine of decreeing the specific execution of verbal contracts, in part performed, is also fully recognized and established by *Lindsay vs. Lynch*, 2 *Sch. & Lef.* 1; *Morphett vs. Jones*, 1 *Swanst.* 172; *Frame vs. Dawson*, 14 *Ves.* 386; *Ex parte Hooper*, 19 *Ves.* 479; *Caldwell and others vs. Carrington's Heirs*, 9 *Peters*, 86; *Phillips vs. Thompson*, 1 *John C. C.* 132; *Graham and Wife vs. Yates and Meyer's Heirs*, 6 *H. & J.* 229, and *Moale and others vs. Buchanan and others*, 11 *G. & J.* 314, and a host of other cases, almost without number, to which it is unnecessary to refer.

It was insisted by the appellee's solicitor that the specific execution of a parol agreement had in no case been decreed where, by the answer, the fact of the agreement was denied, and the statute pleaded. A reference to the authorities will at once shew that this position cannot be sustained.

In *Morphett vs. Jones*, 1 *Swanst.* 172, the bill was filed for the specific performance of an oral contract for a lease of land for twenty-one years. The answer denied the agreement, also the acts charged to have been done in part execution of the agreement, and pleaded Statute of Frauds. The Master of the Rolls decreed the specific performance of the contract, and in delivering his opinion says, "the plaintiff has established a parol agreement in part performed."

A party, who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. In *Caldwell and others vs. Carrington's Heirs*, 9 * *Peters*, 86, the bill **391** sought the specific performance of a verbal contract in behalf of one who had partly performed. The answers denied the contract and pleaded the Statute of Frauds. The specific performance was decreed. Chief Justice Marshall, in delivering the opinion of the Court, saying: "if, therefore it be clearly shewn what the agreement was, and that it has been partly performed, that is, that an act has been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done unless, an account of the agreement, an act, in short, unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement, in such case the agreement will be decreed to be specifically per-

formed." And the reverse of the doctrine insisted on by the solicitor of the appellees is clearly conceded or admitted by necessary implication, in the cases of *Lindsay vs. Lynch*, 2 Sch. & Lef. 1; *Frame vs. Dawson*, 14 Ves. 386, and in the cases decided by this Court of *Graham and Wife vs. Yates and Meyer's Heirs*, 6 H. & J. 229.

No principle is better settled, than that by no device or form of proceeding or solemnity of the instruments, or means used for its perpetration or concealment, can you deprive a Court of equity of the power of "unkennelling a fraud." To permit a defendant, when charged with fraud, to shield himself from a disclosure by a denial of the agreement, and pleading the statute, would be to cloak or conceal a fraud, by means of a perjury. And if such a proceeding were tolerated, instead of its being "a statute for the prevention of frauds and perjuries," it might not inaptly be termed a statute for the encouragement of frauds by the rewarding of perjuries. But, says the solicitor of the appellees, conceding that cases may be found where a specific performance has been decreed, notwithstanding the denial in the answer, of the parol agreement charged, and of the acts of part performance alleged, and the plea of the statutory bar, yet no case can be found in which relief has been granted, where the point on which he now relies was distinctly presented for the * determination of the Court. It may, with equal confidence, be 392 asserted, that no case can be found in which a Court of equity refused relief in such a case, sustained by adequate proof, upon the objection being raised which is now relied on. Indeed, notwithstanding the elaborate research made by the solicitor, he has not been able to find a case where, even in the argument of counsel, such a defence has ever been presented to the consideration of a Court of Chancery. The natural inference from which is, that, until the present occasion, it never was deemed by counsel an available defence. The only case which can be regarded as giving even a momentary countenance to such a principle, is that before referred to in 2 *Desau.* 190, where such a question did not necessarily arise, as in the opinion of the Court there, the act of part performance charged, in relation to the delivery of possession to the vendee, was unsustained by proof.

This preliminary objection to the powers of the Court of Chancery to grant any relief to the appellants (no matter what may be their proof,) being disposed of, our next enquiry is, are the appellants upon the case, as established by proof, entitled to the relief they have sought? To sustain such title, they must surmount double the difficulties ordinarily encountered by a vendee seeking the specific execution of a parol contract by the vendor, on the ground of part performance. They must not only shew the contract made between Edward Hall and Philip Moore, and such acts in part performance thereof, as would entitle them to its specific execution, but they must shew themselves entitled to a conveyance from the appellees,

Charlotte and Maria Hall, under the parol gift, alleged to have been made by them to Edward Hall. That Edward Hall, at the time of his alleged sale to Philip Moore, had made no such expenditures or improvements on the lands in controversy, or done any such acts in relation thereto, as would, as far as is disclosed by the testimony, entitle him to a decree for a conveyance from Charlotte and Maria Hall, is, we think, a proposition too clear to require, in its support, either argument or authority. Philip Moore, by his purchase, at the date thereof, acquired in the * lands no greater interest or superior

393 rights than those possessed by Edward Hall. The proof in the cause does not shew that Charlotte and Maria Hall were present at the time of sale, assenting thereto, or that any such assent had been previously given; nor does it show any such expenditures or improvements on the lands in question as would make it a fraud on the part of Charlotte and Maria Hall, to withhold a conveyance thereof under the alleged parol gift; nor indeed, does the bill filed in this cause charge the making of any such expenditures or improvements.

But suppose it were conceded that the gift made to Edward C. Hall was binding on Charlotte and Maria Hall, and that in virtue of it he could, in a Court of equity, have compelled them to convey to him, have the appellants offered that full and satisfactory evidence of the terms of the agreement, and of its performance on their part, as to entitle them to a decree for its specific execution? It must be borne in mind that Edward C. Hall, by his answer, denies all the allegations in the bill in relation to the contract, or that any portion of the alleged purchase money was ever paid him by Philip Moore. Not a witness in the cause states what, by the terms of agreement, was the amount of purchase money stipulated to be paid. The only two witnesses deposing upon this subject are, first, William F. Giles, who said that Edward C. Hall stated to him that "Philip Moore had paid him four thousand dollars, but deponent cannot recollect, at this time, on what account he stated the said sum of money was paid him by Mr. Moore; and he stated in said conversation that Mr. Moore did not owe him any thing; since that he had made a verbal claim, and accounted for the inconsistency, by stating that his claim was for the interest due him on some legacy under his father's will."

The second witness is James C. Gittings, who states that Edward Hall told him "that it was true that he had sold said farm to Mrs. Moore, and that he had received from said Moore, a part, but not all, of the purchase money." If the testimony of these two witnesses stood unexplained by any other * testimony in relation

394 to the said payment of four thousand dollars, it might well be doubted whether it would be deemed sufficient evidence to overrule the positive denials in the answer, and to prove payment of the entire purchase money. But when we advert to the fact that no proof has been offered to show that four thousand dollars was, by

the alleged agreement, the price at which the land was sold, and that it is undeniably proved, that under the will of Aquila Hall, Philip Moore was bound to pay Edward C. Hall four thousand dollars, the insufficiency of the proof to overrule the answer is most apparent. Nor does this proof, for such a purpose, derive any aid from the numerous orders, checks and receipts which have been exhibited to establish the payment of four thousand dollars by Moore to Edward C. Hall. Indeed, they rather disprove, than prove, that such payments were made on account of the purchase money for the land—a portion of them having been made a year or years before the time of the alleged sale to Moore, and not a receipt given for any of them, giving the slightest intimation that the payment was made on account of purchase money due for land sold. Having failed to establish the payment of the purchase money for the land alleged to have been sold, the Chancellor could not have done otherwise than refuse to the appellants the relief sought by their bill. His decree is therefore affirmed with costs.

Decree affirmed with costs.

• ELIZA JONES vs. RICHARD T. EARLE, Executor of AL- 395
FRED JONES.—December, 1843.

In every case where a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law.

The will and the codicil constitute one instrument; and the codicil revoking in terms a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil, either in express terms, or by a bequest or devise, so entirely inconsistent with the terms of the will as to make it impossible to give effect to both. (a)

A testator devised his slaves, in trust, to be manumitted as they severally arrived at the age of forty years, or immediately upon his real estate devolving on his grand nephew, should it come to his hands; and, in trust also for the term they have to serve, for the use of his wife and any child he may have by her, for and during the term of her natural life, and after her death for the use of any child that may survive her. By a codicil he revoked "that part of my will which manumitted my servants as they severally arrived at the age of forty years, and devised them to his wife, for and during her natural life, and after her death then said servants to be free; but in case that any of said servants shall runaway, and afterwards be apprehended, they shall forfeit their freedom and be sold for life." After the testator's death some of the servants ran away, and they were sold by the widow as slaves for life. The trustees under the will claimed the proceeds for the purpose of investment, and brought an action at law, (in which all errors of plead-

(a) Approved in *Hopkins Univ. vs. Pinckney*, 55 Md. 381.

were waived,) to recover them. *Held*, that the widow was entitled to the fund absolutely.

It is only where, by gratifying a particular intent as to a part of a will, a more general and more important disposition of other parts of it are defeated, that the particular or minor intent must yield. Where both may be gratified there is no conflict, and consequently no necessity to yield either. (b)

A bequest of freedom to slaves, as they arrived at a particular age, is not a legacy to them; nor, when it is granted upon condition of good behavior, will its forfeiture create a lapse, though the bequest of freedom is defeated, the right of the slave after forfeiture, nor to his proceeds after a sale, not being expressly bequeathed to any person.

Where there is a bequest of slaves for life, and of freedom after the death of the tenant for life, a clause in the will declaring forfeiture of freedom in case of running away and a sale for life upon their apprehension, is designed for the benefit of the tenant for life, to secure the good conduct of the slaves, and the proceeds of any such slave sold for absconding, in the absence of any provision to the contrary by the testator. will belong to the legatee for life.

396 APPEAL from Baltimore County Court. *This was an action of assumpsit, commenced by consent of parties, under the following agreement:

It is hereby agreed, that all errors in pleadings be waived, and that the paper marked "Plaintiff's exhibit A," herewith annexed, is a true copy of the last will and testament of Alfred Jones, deceased as well as of the codicil thereto annexed; that after the execution of the said will and codicil, the said A. J. departed this life, and that after his death, the said last will and codicil were duly proved and recorded; that after the same was proved and recorded, the said Richard T. Earle alone took out letters testamentary on the estate of said A. J., and that after he the said R. T. E. became executor as aforesaid, he the said R. T. E., with the consent of the said Eliza Jones, disposed of, and converted into money, all the cattle, sheep and hogs of the said A. J., on his farm at the time of his death, and all the farming utensils, and a part of the household furniture of the said A. J., and that the said R. T. E., as sole trustee under the will, with the consent of the said E. J., invested the said money in bank stock, under a decree of the Court of Chancery, affirmed by the Court of Appeals, for the benefit of the said E. J., during her life, and for the benefit, after her decease, of Arthur T. Jones, who is named in said will. It is also admitted, that the said R. T. E., as sole executor of the said A. J., has paid all the debts and legacies of the said A. J., and passed a final account, as executor as aforesaid, and hath delivered over to the said Eliza Jones, all the property, including the negroes, (except the negroes who had absconded at the time of said A. J's death,) to be held by the said E. J., during her

(b) See *Chase vs. Lockerman*, 11 G. & J. 124, note (f.)

natural life, and that the said R. T. E. has invested the stocks held by the said A. J., at the time of his death, for the benefit of the said E. J., during her natural life, and has paid the dividends thereof, which have hitherto accrued, as well as the dividends that have accrued on the stocks invested under the sanction of the Court of Chancery, to the said E. J. And it is further admitted, that since the said negroes have been delivered over to the said E. J., one of them named Jeff, and another of them named Peggy, * did run away, and were subsequently apprehended, and sold as slaves **397** for life, to purchasers out of the State, by the said E. J., and that the said E. J. received the purchase money for the negroes so sold as aforesaid, and has ever since held the same; that the said sales were made without the consent of the said R. T. E.; that negro Jeff ran away about the 6th of August, 1836, and was apprehended and sold by the said E. J. about the 20th of August, 1836, for the sum of \$800, and that the expenses of apprehending the said negro Jeff, amounted to \$50, which expense was paid by the said E. J.; that about the 25th of March, 1841, negro Peggy ran away, and that she was apprehended and sold about the 30th March, 1841, for the sum of \$575, and that the expenses of apprehending her amounted to seven dollars, which amount was paid by the said E. J. It is further admitted, that the said R. T. E., as executor as aforesaid, had no knowledge of the said sales, at the time that they were made and never consented thereto, and that since the said sales, and before the bringing of this suit, he demanded from the said E. J. the proceeds of the said sales, for the purpose of investing the same for the use of the said E. J., during her life, and after her death, for the benefit of Arthur T. Jones, the residuary legatee in the will of the said Alfred Jones, but that the said Eliza Jones refused to pay over the said proceeds, and claimed the said slaves as having been forfeited to her. It is further agreed, that no objection is to be made to the form of this action. It is further admitted, that R. T. E. is the only trustee named in the will of Alfred Jones, who has accepted the trust; that the case be docketed to May Term, 1842, of Baltimore County Court; that the *nar.* plea and foregoing statement of facts and argument, be filed, and that judgment *pro forma* be entered by Baltimore County Court, for damages in *nar.* to be released on payment of \$1,318, and costs, and that the defendant may appeal to the June Term of Court of Appeals, without giving security.

The will of Alfred Jones, referred to in the statement, after disposing of his real estate, proceeded as follows:

* "I give and bequeath unto my said friends, (R. T. E. and others,) their executors, administrators and assigns, all my **398** personal estate, of every description: In trust, nevertheless, to manumit all my slaves as they severally arrive to the age of forty years, the said forty years of age to be determined by an entry in the last part of my oldest day-book, where I have made a list of their names

and respective ages; and to manumit all my said slaves, immediately upon my real estate devolving on my said grand nephew, Arthur T. Jones, should it come to his hands; and in trust also, to hold my said estate, including my said slaves, for the time they have to serve, for the use of my said dear wife Eliza Jones, and any child or children I may have by her, for and during the term of her natural life, and after her death, for the use of my child or children that may survive her, their executors, administrators and assigns, for ever. If my said wife should have no child or children by me at her decease, or if my surviving child or children should die without lawful issue of their bodies before they arrive at the age of twenty-one years, then, in trust, to hold my said personal estate, except my slaves, for the use of my grand nephew, A. T. J. aforesaid, his executors, &c., for ever." There were other devises over of the testator's personal estate except his slaves. The testator also made provision for the support of some of his aged slaves, then unable to labor. This will was dated on the 16th August, 1830.

On the 15th February, 1831, the testator added the following codicil to his will:

"I hereby revoke and make void that part of my will which manumitted my servants, as they severally arrive at the age of forty years and do now give and devise all my said servants (except old Harry,) to my dear wife, for and during her natural life, and after her death, then said servants to be free; but in case that any of said servants shall run away, and afterwards be apprehended, they shall forfeit their freedom, and be sold for life. I do hereby give and devise to my dear wife the sum of one thousand dollars, to dispose of as she may think proper. If any of my servants, which I have at this time run * away, shall be apprehended after my death, I do

399 hereby direct that they shall be sold for life."

Upon this agreement, Baltimore County Court rendered judgment for the plaintiff, and the defendant prosecuted this appeal.

At the argument here, the parties made further admissions, as follows:

It is admitted that Alfred Jones died, having had no child, nor descendant of a child, but leaving a brother at the time of his death, and that since the bringing of this suit, Eliza Jones, the appellant, has died, and that in deciding this case, the decision is to be the same as it would have been, if the suit had been brought after the death of Eliza Jones, against her administrator, except, that if the Court should be of the opinion that no suit could properly be brought until after the death of Eliza Jones. Costs are to be allowed the appellant.

It is also agreed, that the record shall be amended, by inserting in lieu of the following agreement of counsel, (*ante*), to wit:

It is agreed that the case be docketed to May Term, 1842, of Baltimore County Court, &c., down to the words, "without giving security;" and signed by, &c. The following agreement, to wit:

It is agreed that this case be docketed to May Term, 1842, of Baltimore County Court; that the *narr.*, plea and foregoing statement of facts be filed and submitted to Baltimore County Court, for their judgment; and it is agreed, that if said Baltimore County Court shall be of opinion, on the foregoing statement of facts, that the plaintiff is entitled to recover, then said Court shall give judgment for the plaintiff, on said case stated, for the damages in the declaration, to be released on payment of the sum of \$1,318, and costs; and if they shall be of opinion, that on said statement of facts the plaintiff is not entitled to recover, then judgment is to be entered for the defendant for costs. And it is also agreed, that from the judgment of said Court either party may appeal.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

* *G. R. Richardson, D. A. G., and Reverdy Johnson*, for the appellant. *G. M. Gill and McMahon*, for the appellees. 400

CHAMBERS, J. delivered the opinion of this Court. In this, as in every other case in which a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator; which is to be carried into effect, unless opposed by some principle of positive law. The will and the codicil constitute one instrument; and the codicil revoking, in terms, a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil either in express terms or by a bequest or devise so entirely inconsistent with the terms of the will, as to make it impossible to give effect to both.

The terms of this will are plain and perspicuous. In the contingency which occurred, and was apparently anticipated by the testator, that is to say, the survivorship of his wife, without children, she would have taken an interest in all the negroes during her life, or until they should severally arrive to the age of forty years, at which age they were to be successively manumitted by the trustees. The will made no provision in regard to such as should abscond from service, nor any distinction between such as should be faithful and such as should be disobedient.

The existing provisions of our laws, however, have made some distinctions on the subject. If any one of these negroes had absconded from the service of the legatee, the Courts, on her application, would have extended the term of service of such negro beyond the age limited by the will for a period sufficient to reimburse to her the loss of his service, and all cost and expense in retaking him. That additional service would have enured exclusively to her advantage.

The codicil indicates that the testator was not content with this sanction for the fidelity of the negroes, and its main design seems to

be to secure their services to his wife for her * life, and then
401 to have them liberated. The codicil is obviously written with less professional skill, but we think it develops the intent of its execution. It revokes in explicit terms that portion of the will "which manumitted his servants as they severally arrive at the age of forty;" and this manifestly because it opposed his wish, which he, in the same sentence, proceeded to declare, by adding that he "does now give and devise all his said servants to his wife, for and during her natural life, and after her death then said servants to be free." The will carefully excepts the negroes from the other property whenever it is spoken of as passing beyond his wife and children, if any. All the interest in the negroes which is bequeathed at all is, by the will, given to the wife and children, and by the codicil to the wife alone, and in every instance where other legatees are necessarily named they are expressly excepted as not to be included in the bequest. With the evidence furnished by these facts it would seem difficult to suppose the clause in the codicil, for the punishment of fugitive servants, designed for the benefit of those other legatees. It is however contended that a more general intent of the testator will be defeated by any other interpretation. But we do not perceive that the least violence is done to any such general intent. If indeed there be assumed a general intent to give all the property after his wife's death to the other legatees, that would be defeated; but this is assuming the precise matter of controversy. We regard the leading intent of the instrument to be, that his wife should enjoy all his estate for her life, and that after her death the other legatees should enjoy it all except the negroes, and this will not be deranged or defeated with regard to anything else except the particular specific article of property which is to be disposed of according to specific directions. It is no objection to a bequest or disposition of one item of property, that the testator designed all the rest of his estate to go in a different direction. It is only where, by gratifying a particular intent as to the part, you defeat a more general and more important disposition of other parts, that the particular or minor intent must yield. Where both * may be
402 gratified there is no conflict, and consequently no necessity to yield either.

Various parts of the will, we think, indicate a particular intent to confine to Mrs. Jones the whole benefit which, by the will, is disposed of, either for the services of the negroes or the proceeds of their sale. By giving effect to this intent we do not disturb any purpose of the will to give to the wife a life estate in everything else than the fugitive slaves, and to the other legatees the whole personal estate bequeathed to them after the wife's death.

It has been strongly urged that the bequest in relation to the negroes is to be regarded as a legacy, and that the forfeiture of freedom and sale defeats its operation and causes it to lapse and fall

into the residuum of the estate, and then pass, with other property, to the trustees.

We cannot so regard it. The idea of a lapsed legacy can only be connected with some thing or object which, failing by some cause to reach the legatee, is received by some other person, generally the residuary legatee, if there be one. What is the object or thing in this case? Not the freedom of the servants, because that cannot pass to a residuary legatee; nor the services of the servants, because they were never bequeathed to a specific legatee who is not capable of taking. The fugitive negro was to be sold, and the immediate contest is, to whom the proceeds belong. If these proceeds can be regarded as a lapsed legacy it must be in consequence of the failure of a previous bequest of them. But that previous bequest is the precise matter of inquiry, and if ascertained, determines the difficulty, not by reason of its being a case of lapsed legacy, but because, finding the first legatee, we find one capable of taking. Again, we cannot regard the residuary clause relied on as capable of passing any interest in these fugitive slaves, even if it could be considered as a case of lapse legacy, inasmuch as the will has so carefully and repeatedly excluded the negroes from the residuum, which he designed to pass to his collateral relations, by saying, in so many words, in not less than four different instances, when referring to his personal estate, "except my slaves."

* Being of opinion, for these reasons, that the whole interest in the negroes sold was given to the appellant, it is quite unnecessary to examine the various other points raised in the argument. Let the judgment be reversed, and judgment be entered for appellant for costs. **403**
Judgment reversed.

ARCHER, J., dissented.

MARY A. DARRINGTON and others *vs.* WILLIAM ROGERS and others.—December, 1843.

The election of a widow to stand upon her legal rights, though it occasions loss to devisees under her husband's will, is still a loss resulting by operation of law, and against which the testator only could have provided an indemnity. (a)

By the election of a widow to renounce her husband's will, all devises and bequests made to her are inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises to her had been made.

Apart from the Act of 1810, concerning lapsed legacies and devises, it stands precisely in the condition in which it would have stood had the wife died in the life-time of the testator.

(a) See *Hanson vs. Worthington*, 12 Md. 488.

Where the testator directed the sale of all his real and personal estate, and disposed of the proceeds of sale, and all the residue and remainder of his estate generally, the one moiety to trustees for the benefit of his wife and children in the manner specified in his will, and the other moiety to trustees for the benefit of the complainants, if, from any cause, the legacy to the wife lapsed, it could not sink into the general residue.

Where a testator divided the residue of his estate into moieties, and devised them to two distinct classes of devisees, one of them his children and heirs-at-law, the other collateral relations, but directed that his widow should have a portion of the moiety given to the children in lieu of dower, and she renounced the will, her portion will be deducted from the moiety given to the collateral relations, as the legacy to her, in consequence of her renunciation, becomes a residuum unaffected by any testamentary disposition, and as such vests in the testator's heirs or next of kin. (b)

By the Act of 1880, ch. 185, it was declared that no appeal shall hereafter be allowed from any decree or order of the Court of Chancery, unless it be a final decree or order in the nature of a final decree. *Held*, that an appeal from an order referring a cause to the auditor, for an account, with directions as to the mode of stating it, was not authorized under that Act.

404 * APPEAL from the Court of Chancery. On the 11th October, 1841, the appellants filed their bill, alleging that they were legatees mentioned in the last will of Zachariah Woollen, who died in August, 1837; that by its provisions the real estate of the deceased is directed to be sold by his executors, and after payment of his debts, one-half of the net proceeds are directed to be invested or lent out on mortgage, or on security, &c., and the rents and profits, &c., arising therefrom to be applied for the separate use and sole benefit of the complainants; that Rebecca Woollen, widow of the testator, William Rogers and James Tracey, were constituted executors by the will; that J. T. renounced his appointment; that letters testamentary were granted to the other two; and that Rebecca has since married with Edward S. Myers. The bill then alleged that the executors had settled several accounts, some of which were intended to be contested; that complainants had received less than half the interest due them in four years, since the death of the testator; that the complainants are informed and believe that the executrix and executor, (which last is also trustee,) insist that the complainants are not entitled to the use and benefit of one equal moiety, or half part of the said estate, but that they are entitled to one-half after deducting a proportion of the said Rebecca, as widow, she having refused to abide by the will; renouncing the provisions in her favor, and relying on the provisions of law in her behalf, against which construction of the will these complainants protest; that the testator at his death left three children, all of whom still

(b) Distinguished in *Hinkley vs. House of Refuge*, 40 Md. 470.

survive and are infants of tender years; that the trustees under the will have failed to invest one-half of the net proceeds of the estate for the use and benefit of complainants. Prayer for relief according to the will, sale and investment, subpoena, &c.

The testator by his last will devised as follows: "Item: I hereby direct my executrix and executors, hereafter named, or the survivors, or acting ones of them, to sell and dispose of, at, &c., to the best advantage, all my real, leasehold and personal estate, except my household and kitchen furniture; and * upon receipt of the purchase money therefor, make, execute, &c., to the purchaser, one **405** or more good and sufficient deed or deeds of conveyance for the same, the proceeds arising from which sale, with all the residue and remainder of my estate, generally, I devise and dispose of in manner following, that is to say:

First, One moiety, in which is to be included all my household and kitchen furniture, I devise and bequeath unto my friends William Rogers and James Tracy, and the survivors, and survivor of them, and their, &c., in trust; nevertheless, that the same shall be held and invested by the said trustees, or, &c. in some productive stock, &c., or placed out at interest, on, &c.; and the investments from time to time to change, &c.; and that my beloved wife, Rebecca Woollen, during her widowhood, be permitted to have, receive, and apply the dividends, rents, profits, interest and income, arising therefrom, to the support of herself, and to the support and education of our dear children, during their minority; and from and immediately after the intermarriage of my said wife with any other person, then in trust, that the one-third of the principal of the said moiety, or half part of my estate, shall become the property of and be forthwith conveyed, assigned and transferred to my said wife, Rebecca, her, &c., absolutely; and the remaining two-thirds thereof shall become the property of and be equally divided between the children I now have, or the child or children I may hereafter have, their heirs, &c., absolutely, as tenants in common, share and share alike; but in case my said wife shall not intermarry with any other person, then immediately after her decease, the principal of said entire moiety or half part of my estate, shall become the property of and be equally divided between the children I now have, and the child or children I may hereafter have, their heirs, &c.; absolutely, as tenants in common, share and share alike, the issue of any deceased child, if any such issue there should be, either in the division of the two-thirds or of the whole of said moiety, to have and take the part or share only to which the parent of such issues would, if living, be entitled. And in the event of the decease of any * of my children, under age and without issue, the part or share of him, her or them, so **406** dying, shall descend to the survivors or survivor of them.

Secondly. And the remaining or equal half part of my estate I devise unto my said friends William Rogers and James Tracy, and

the survivors, &c., in special trust, that the same shall be held and invested by the same trustee, &c., in some productive stock, &c., or placed out at interest on good mortgage, &c., and the investments from time to time, to change, &c., for the period of five years from the time of my decease, and that during that period my sister, Mary Ann Darrington, and her children, Mary Ann Craig, &c., be permitted and suffered in equal proportions, to take, receive, and have applied, for their separate use and sole benefit, the dividends, rents, &c., arising therefrom, without being subject to the control of their respective husbands, or bound for the fulfillment of their contracts. And at the expiration of said five years, then in trust, that one equal thirteenth part of the principal of said moiety shall be conveyed, &c., and paid over. And I do hereby devise the same unto my said sister Mary Ann Darrington, her, &c., absolutely, one other equal part of the principal of said moiety shall be conveyed, &c. And I do hereby devise the same unto my said nephew William Lovell, his &c., absolutely. And in trust as to the remaining eleven-thirteenths thereof, that each one of my other nephews above named, until they severally attain the age of twenty-five years; and each one of my nieces above named, during their respective natural lives, be permitted and suffered to take, &c., to their sole and separate use and benefit, respectively, one-eleventh part of the dividends, rents, &c., arising therefrom, without, so far as it relates to the portions of all my nieces above named, being subject to the power, &c. And in trust, as my nephews, hereinbefore named, severally attain to the age of twenty-five years, that one-eleventh of the principal estate shall then be conveyed, assigned, transferred and paid over. And I do hereby devise such one-eleventh to each of them respectively, their heirs, executors, administrators, and assigns, **407** * absolutely. And in further trust, that my nieces hereinbefore named, respectively may, and I do hereby fully authorize and empower them, respectively, by any instrument of writing, in the nature of, or purporting to be, her last will, &c., to devise and dispose of one-eleventh of the principal estate to such person or persons, or for such uses and purposes as my said nieces respectively shall think proper and direct; and in case any of them shall neglect or omit to make such devise, bequest or disposition of such one-eleventh, then in trust, that such one-eleventh shall descend to, and become the property of. And I do hereby devise and bequeath the same unto the child or children of my nieces respectively, who shall so omit or neglect to make disposition thereof, as before authorized, and to the heirs, &c.; if more than one, to be equally divided between them, as tenants in common, share and share alike. But in case any of my nieces, so omitting to make a will and testament, shall depart this life, without leaving a child or children, or descendants of the same, living, then in trust, that the one-eleventh of the principal estate of my niece or nieces, so dying, &c., shall descend to,

and become the property of; and I do hereby bequeath the same, absolutely, unto the right heirs of such niece or nieces, respectively. And in case any of my nephews or nieces, hereinbefore named, shall depart this life, under lawful age, and without issue, the part and share of my estate, devised to or for the benefit of him, her or them, so dying, shall descend to the survivors or survivor of them.

Lastly. I do hereby nominate and appoint my said beloved wife, Rebecca Woollen, and my friends, William Rogers and James Tracy, to be executrix and executors of this my last will and testament. And I also appoint the two last above persons to be guardians of my children, hereby revoking all former wills by me made, and declaring this to be my last and only one.

With this will were also filed—

The renunciation of James Tracy as executor and trustee.

The renunciation and election of Rebecca Woollen as widow.

Various accounts of the administration of Z. W's estate.

* After the answers of the several defendants were filed, at March Term, 1842, the Chancellor [BLAND,] passed an **408** order, directing a sale of Z. W's real estate, and appointed a trustee for that purpose as usual; and after a notice to creditors to file their claims, he further ordered, that the said executors, the defendants, William Rogers, and Edward S. Myers and Rebecca, his wife, account with the other parties to this suit, of and concerning the personal estate of the said Zachariah Woollen, deceased, which may have come to their hands, or been distributed by them, or otherwise. And this case is hereby referred to the auditor, with directions to state such account accordingly, from the pleadings and proofs now in the case, and such other proofs as may be laid before him, in which he will distribute the said personal estate of the deceased, so far as it will go; in the first instance, among his creditors in satisfaction of their claims, and then the proceeds of the sale of the said real estate in discharge of so much of the said claims as may have been so left unsatisfied from the personal estate. And then, considering the will of Zachariah Woollen, deceased, as operating only upon so much of his estate as he might thus lawfully dispose of, the auditor will award to the said Rebecca Myers, as the widow of the said deceased, her legal distributive share of the surplus, if any, of the said personal estate, together with the value of her dower, out of the whole net amount of the proceeds of the sale of the said real estate, to be ascertained according to the rule of the Court, and then the auditor will distribute the residue of the proceeds of the sale of real estate, together with the residue of the surplus, if any, of the personal estate; first, dividing the same into equal moieties, as directed by the last will and testament of the said Zachariah Woollen, deceased; and the parties are hereby authorized to take testimony in relation to the said accounts and statements, before any justice of the peace, on giving three days notice,

as usual; provided, that the said testimony be taken and filed in the Chancery office, in this case, on or before the expiration of the time allowed to creditors to file the vouchers of their claims as aforesaid.

409 * From this decree, the complainants, who were entitled to the moiety, secondly devised by the said Z. W., appealed to this Court, having filed in the Court of Chancery the following agreement:

It is understood, and hereby declared, that the complainants, in appealing from the decree of his Honor the Chancellor in the above case, do not mean thereby to delay or interfere with the execution of the duties of the trustee, nor with the adjustment of the accounts of the executors of Zachariah Woollen with said complainants, nor with any of the other directions of said decree, than that which allows and awards to said complainants one-half of two-thirds only of the net proceeds and balance of the real and personal estates of said Zachariah Woollen; the said complainants claiming and protesting that they are entitled to one-half of the whole of said net proceeds and balance, and this they design to urge on said appeal.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, JJ.

N. Williams and *W. Schley*, for the appellants.

W. F. Frick, for the appellees.

DORSEY, J., delivered the opinion of this Court. The testator having directed the sale of all his real and personal estate, without any preceding devises or bequests, declares that he gives and disposes of the proceeds of sale, "and all the residue and remainder" of his "estate generally," the one moiety or half part thereof, to trustees, for the benefit of his wife and children in the manner specified in his will, and the remaining moiety or half part, to trustees, for the benefit of the complainants. The testator thus divided his estate into two separate and distinct moieties; giving each moiety to different persons; and by nothing that appears in the will, can we even raise an inference, that upon any contingency or condition that might happen, the whole or any portions of those distinct moieties were ever again to commingle; or that the legatees, entitled to one moiety, should ever become entitled * to any portion of the
410 other. In the contemplation of the testator, as far as we can collect it from the face of the will, the moieties were intended to be as completely separated and as permanently distinct from each other as if they had never formed one common fund or residue and remainder. It is true that the testator had made bequests, to his wife, out of one of those moieties, which he thought would have been a sufficient temptation to have prevented her from asserting her legal rights to his estate. But for the event of her doing so, he has pro-

vided no change or substitution in the testamentary disposition of his property. And he having failed to do it, we cannot do it for him; the more especially as it would, *pro tanto*, work the disinheritance of his children and heirs-at-law. The election of the widow, to stand upon her legal rights, does, it is true, occasion loss to the appellants; but it is a loss resulting by operation of law, and against which the testator only could have provided an indemnity. The condition of the children, too, was changed by the election of their mother; they might also have sustained loss, by receiving less than their father had given, and by his will designed to have given them. Suppose the widow had died immediately after having made her election, what would have passed to the children under their father's will? Two-thirds of a moiety of his personal estate, and a moiety of the real estate, subject to a dower. But suppose she had died, about the same time, without any renunciation of the bequests made to her by the will, what then would the children have received? By the express terms of the devise to them, an entire moiety of their father's estate, both real and personal.

Upon the election of the widow, all devises and bequests made to her by the will were inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises and bequests had ever been made to her. Apart from the Act of 1810, concerning lapsed legacies and devises, it would stand precisely in the condition in which it would have stood had the wife died in the life-time of the testator. In * such a condition of things, would not the limited temporary interest of the wife, (under **411** the will,) in the moiety, have sunk and passed, under the limitation, over to the children in perpetuity? By the marriage of the wife subsequent to her renunciation of her husband's will, no change is wrought in her rights or the rights of other persons in the estate of the testator. The rights of all parties remain the same that they were when the renunciation was made, and that they would have been, had no such provision, in relation to the second marriage, been contained in the will. But should we regard this contingent legacy to the wife, after her election, as so far continuing to operate, as upon the happening of the contingency, to become a lapsed legacy, it could not sink into that general residue and remainder, which, by the express direction of the testator and in legal contemplation, had antecedently been divided, and of one of which divisions it formed a part. Under the devises and bequest to the complainants, we think it manifest, that no part of it passed. See the cases of *Wisner vs. Barnet and al.* 4 Wash. C. C. R. 631; *Cruse vs. Barley*, 3 P. Wms. 20; *Davers vs. Dewees*, 3 P. Wms. 40; and *Collins vs. Wakeman*, 2 Ves. Jr. 683.

But suppose we are wrong in the construction we have given to the will, under the contingencies that have occurred, in regarding

the entire moiety as passing to the children under the devise in their favor, subject only to the rights of the widow, in virtue of her election. The legacy to the widow in virtue of her renunciation, having lapsed or become void, and failing to pass under any of the devises or bequests in the will becomes a residuum of the testator's estate, unaffected by any testamentary disposition, and as such, vests not in the complainants, but in his children, as heirs and next of kin.

This case has been brought up to this Court by appeal, contrary to the provisions of the Act of 1830, ch. 185, and must therefore be dismissed. In venturing, under such circumstances, at the earnest solicitation of the solicitors of both parties, to express our opinion upon the merits of the present controversy, we wish it to be distinctly understood, that this act of * the Court is not to be
412 regarded as a precedent to be followed in any future similar appeal. There is already more business, legitimately before us, than can be definitively disposed of before we shall be called on to attend the Courts in our districts; it cannot therefore be reasonably be expected, that we should suffer our time to be consumed in the argument of cases, for the decision of which, we have no jurisdiction.

Appeal dismissed.

WILLIAM J. COLE vs. ANTHONY ALBERS and THEODORE RUNGE.
 December, 1843.

To vacate a deed by the insolvent laws existing anterior to the Act of 1834, ch. 283, the grantors, at the time of executing the deed, must have contemplated taking the benefit of the insolvent laws; otherwise, the deed could not therefore be condemned as made with a view or under an expectation of being and becoming an insolvent debtor, and with intent thereby of giving an undue and improper preference.

A deed made at the request of the creditor, prior to the Act of 1834, was not within the meaning of our insolvent laws.

The Act of 1834, ch. 293, so far as it authorizes the Courts to vacate conveyances made in contemplation of insolvency, is a local law confined to the City and County of Baltimore, and does not apply to cases where the grantee had not notice of the insolvent condition of the grantor.

Where, after the execution of a deed of mortgage, the mortgagor lent money and sold goods to the mortgagee, and took notes for the payment of his debt, in semi-monthly instalments, this is evidence that he did not know his debtor to be in an insolvent condition.

The notice required by the Act of 1834, to vitiate a conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor of such conveyance. (a)

(a) Cited in *Preston vs. Leighton*, 6 Md. 99; *Brooks vs. Thomas*, 8 Md. 373; *Falconer vs. Griffith*, 3 Md. Ch. 153; *Brooks vs. Thomas*, 4 *Ibid*, 22.

At common law a debtor has a right to prefer one creditor to another, and, independent of our statute in relation to insolvent debtors, may give such preference. (b)

Evidence cannot be admitted which would have the effect of changing the character and legal operation of a deed.

When a deed purports to have been made on a moneyed consideration, it cannot be shown that money did not constitute the consideration; where a deed is impeached for fraud, and the consideration stated is money, it will not be allowed to set up a different consideration as marriage to support the deed. (c)

* Where the consideration stated in a mortgage is a sum of money in hand paid, and it is taken to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made, and to be made, to that extent. Such evidence would not affect the nature of the deed. It would still be founded on a money consideration. (d) **413**

Such evidence is also admissible to rebut the idea of fraud, by showing the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. (e)

The design of the Act of 1825, ch. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of the execution of their mortgage, of which the mortgage, by its terms, gave no notice. (f)

A deed executed to cover a mortgage against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, would be within its provisions.

APPEAL from the Court of Chancery. The bill in this cause was filed on the 11th February, 1841, by William J. Cole, and alleged that before the 1st September, 1839, Charles Brecht, of the City of

(b) Cited in *Stewart vs. Bank*, 2 Md. Ch. 64; *Anderson vs. Tydings*, 3 *Ibid*, 169. See *Hickley vs. Bank*, 5 G. & J. 288, and the Insolvent Acts of 1880, c. 172, and 1884, c. 295.

(c) Approved in *Ellinger vs. Crowl*, 17 Md. 375; *Thompson vs. Corrie*, 57 Md. 200; *Sewell vs. Baxter*, 2 Md. Ch. 455; *Glenn vs. McNeal*, 3 *Ib*. 350; *Notley Young's Estate*, *Ib*. 468. Distinguished in *Glenn vs. Randall*, 2 Md. Ch. 226. Cited in *Benscoter vs. Green*, 60 Md. 330; *Elysville Co. vs. Okisko Co.* 1 Md. Ch. 395. See *Betts vs. Union Bank*, 1 H. & G. 126.

(d) Approved in *Wilson vs. Russell*, 13 Md. 530, 533; *Cunningham vs. Dwyer*, 23 Md. 230; *Mayfield vs. Kulgour*, 31 Md. 247; *Comegys vs. Clarke*, 44 Md. 111. Where a mortgage stated the consideration therefor to be \$2000 "cash in hand paid," and the evidence showed that it was a note under seal for the same amount, being a pre-existing debt due to the mortgagee by one of the mortgagors, it was held that the consideration proved was not different in character from that stated in the mortgage, and the proof was admissible in support of the consideration stated. *Comegys vs. Clarke*. As to mortgages to secure future advances, see, Rev. Code, Art. 66, sec. 43, amended by Act of 1882, c. 471.

(e) Approved in *Waters vs. Riffin*, 19 Md. 550; *Cunningham vs. Dwyer*, 23 Md. 230; *Smith vs. Davis*, 49 Md. 488.

(f) Cited in *Maus vs. McKellip*, 38 Md. 236; *Notley Young's Estate*, 3 Md. Ch. 478. See Act of 1882, c. 471.

Baltimore, merchant, was indebted unto Albers and Runge, of Baltimore, as co-partners, and various other persons in said city, in large sums of money, was actually insolvent; and which insolvency was known to said Albers & Runge; that on the day above mentioned C. B. formed a co-partnership with one Frederick Uthoff, also of said city, and that the said C. B. then had a stock of goods of some value, which passed to himself and the said co-partner, and that the said partnership took upon themselves the debts of the said C. C.; that at the time said partnership was formed the said F. U. had a capital of \$3,240, the whole of which was paid to Albers & Co. on account of their said claim against C. B., whereby the claim of A. & Co. against C. B. was reduced to \$1,286.62, and the new firm of B. & U. was rendered actually insolvent when they commenced business, but which was kept secret from the then creditors of the said C. B. & Co.; that on the 2nd December, 1839, C. B. & Co., then being actually indebted to A. & Co. in the sum of \$4,753.08, including the above balance of \$1,286.62, and no more, and being then actually insolvent, and intending to give the said Albers & Co. as undue, illegal and improper preference, and in fraud * of the rest of their creditors made to the said A. & Co. a bill of sale for all the goods, merchandise and furniture then remaining, standing and being in the store No. 95, in Baltimore street, and then in occupation of the said B. & U., as is therein specified, and also of all the outstanding promissory notes and other evidences of debt belonging to them, or either of them, and all future proceeds and avails arising from sales of the goods of said store, for the professed consideration of the sum of \$10,000 in hand paid, when, in truth and in fact, no such sum of money, nor any part thereof, was paid, and there was not any other consideration than the above mentioned balances of account, and that the said pretended consideration was inserted further to deceive and defraud their creditors, and to give to the said A. & Co., an undue, illegal and improper preference. The said bill further alleged that on the 1st September, 1840, or about that time, the said F. U. and the said T. R., (their respective partners C. B. and A. A., then being in Europe, where the said A. A. now resides,) contriving and intending how further to injure and defraud the creditors of C. B. & Co., agreed together that the said T. R., by virtue of the bill of sale herein before mentioned, should take possession of and sell and dispose of the goods, &c. of C. B. & Co. to a very large amount, and in fact of nearly the whole thereof, for the purpose of paying the said balance so due as aforesaid; and that about that time the said F. U. actually delivered to the said T. R. goods, &c. to the value, as per invoice, of \$7,959.97; that the greater part of the said goods so delivered by the said F. U. to the said T. R. were not in fact included in the said bill of sale; that the said F. U. also delivered to the said T. R. divers promissory notes, of persons, names unknown, and that on the 17th September, 1840, the said F. U., and on the 6th October,

1840, the said O. B., applied for relief under the insolvent laws of Maryland, and that on the 8th of January, 1841, the complainant was appointed trustee for the benefit of their creditors, and gave approved bond, with security, as such; that complainant being advised that the payment of the said sum of \$3,240, by B. & U. to A. & R., and the execution of the said bill of sale * and delivery of goods, &c., was illegal, fraudulent and void, after his appointment as **415** aforesaid, made application to the said T. R. to pay to him as trustee as aforesaid, the said sum, &c., and deliver up, &c., in order that he might make distribution among the creditors of the said B. & U., but that the said T. R., contriving and intending how further to injure and defraud the complainant and the creditors of the said B. & U., pretends that the said sum of \$3,240 was rightly paid by B. & U., and that the bill of sale, &c., rightly made and delivered to A. & R., and refuses to pay, &c. Prayer for subpœna; answer to bill and various specific interrogatories; for an account; that the bill of sale may be declared fraudulent and void; that A. & R. may be decreed to pay and deliver up the money, property and effects in their hands of the said insolvents; that their claim as creditors may be forfeited for their collusion with the said B. & U. to obtain an undue preference, &c.

The answer of Albers & Runge alleged that prior to the 7th August, 1837, C. B. was a partner of the firm of Rhodes, Eicke & Co., which carried on business in Baltimore, till that day, when it was dissolved, and B. then commenced and carried on business on his own account in said city. The business in which the said B. was almost exclusively engaged was selling by retail silk piece goods, of which the defendants were importers; that B. applied to the said A. to send to Europe large orders for silk piece goods, to be imported by him, and to be settled for on their arrival, either by the payment of their cost in cash or in some other satisfactory way, an engagement frequently made by those in the retail trade with importing merchants who enjoyed a credit abroad; that B. also applied to A. to sell him goods on credit, and to lend him money when he stood in need of it, all of which said A. was perfectly willing to do for the assistance and accommodation of the said B., if he could be made safe in so doing, and it was accordingly agreed between them that the said A. would accommodate the said B. in the way he wished, provided said B. would secure him by executing a mortgage or bill of sale on his stock of * goods, outstanding debts, furniture, &c., and with the understanding that the sum of money to be ad- **416** vanced, including goods sold to Brecht, was at no time to exceed the sum of \$10,000; and in the month of August, 1837, the said B. & A. applied to a magistrate to prepare a bill of sale. In conformity with the above agreement said bill of sale was drawn up, and executed on the 16th August, 1837, and recorded; and said bill of sale appears on its face to have been made for the consideration of \$10,000, paid by

said A. to B., but there was at the time when it bears date only the sum of \$716, ¹/₄, actually due from B. to A.; said Albers had, however, at that time sent out orders for goods for account of B. to the amount of \$3,563, which arrived early in the month of October following, and were then delivered to said B. without further security than said bill of sale. It was the intention of said bill of sale, and was expressly so agreed upon between the parties thereto, that it should stand as a security for the sum then due, as well as for all subsequent debts which might become due from said B. to said A. to an amount not exceeding \$10,000 at any one time. From that time said A., relying upon the security afforded by said bill of sale, gave extensive credits to said B., both by selling him goods and loaning him money; that on the 1st January, 1838, said A. took T. R., who had been his clerk since 1st January, 1836, into partnership with him, and soon after said A. sailed for Europe, where he has ever since remained; that early in the year 1839, B. proposed to take U. into partnership with him, who was his clerk and bookkeeper, provided he (U.) would put into the concern a capital of \$3,000; said U. assented and succeeded in obtaining said amount, as these defendants have been informed and believe, from his father, who deposited four thousand Rex dollars to the credit of said U. with a house in Bremen; at the request of said U. these defendants drew a bill for that amount, at the then current rate of exchange, making \$3,240, which by order of said U. they passed to the credit of said B. on the 30th July, 1839, and on the 1st September, 1839, said U. in pursuance of the above agreement, entered into a co-partnership

417 * with said B., under the firm of C. B. & Co.; at this time B. had a valuable stock of goods, which passed to the new firm; and defendants admit that the debts due to as well as by said B. also passed to said new firm, which became entitled to receive the former as well as bound to pay the latter; that after the establishment of C. B. & Co. this defendant, T. R., thinking that the bill of sale above mentioned might not avail to secure the debts due by C. B. & Co. to Albers & Co., applied to said C. B. & Co., and requested them to execute a new bill of sale, which they did on the 2nd December, 1839; that said bill of sale, like the former, states on its face that it was made for the consideration of \$10,000, but at the time of its date there was due from C. B. & Co. to Albers & Co., the sum of \$6,418.73, and Albers & Co. had become responsible for C. B. & Co., by endorsing their paper to the amount of \$2,264 more, making in all \$8,682.73, at the date of said bill of sale; and it was the intention of said bill of sale, and was so expressly understood between the parties thereto, that it should stand as a security, both for the sum then due and for the notes on which said A. & Co. had become liable as endorsers as aforesaid, as well as for all subsequent debts which might become due from said B. & Co. to said A. & Co., to an amount not exceeding \$10,000, at any one time, and these defendants wholly

deny that the object of either of said bills of sale was to give to said A., or the said A. & Co., an undue, illegal and improper preference, or to hinder, delay and defraud the rest of the creditors of the said B. or B. & Co.; that the object of both bills of sale was to give A. and A. & Co. a legal security for the important assistance which they rendered, first to B., and afterwards to B. & Co., and that the intention of the second bill of sale was merely to carry out, in good faith, the agreement originally entered into, and that there was no other consideration for said bill of sale than that stated. The answers then denied that the execution of the bills of sale, or the debts due to them, or the knowledge they had of the condition of the firm of C. B. & Co. were in any way kept secret by them from the rest of the creditors; that said bills of sale *were duly recorded, which was notice to all the world; and that de- 418
fendants had no knowledge or suspicion that said B. was insolvent. The answer then proceeded to set forth a variety of transactions between said partners, and first heard of insolvency of the firm of B. & Co., in February, 1840, when sued, examined their books and so found it; that on the 21st August, 1840, said R. demanded of U. (his partner B. being then absent,) delivery of the goods conveyed by said bills of sale for the payment of their debts, said U. accordingly delivered up to him the said goods. The answers also denied that the greater part of the goods as aforesaid, delivered to the defendants, was not included in said bill of sale, on the contrary, that all of said goods were in the possession of B. & Co., at the time of the execution of said last mentioned bill of sale, and were included within it, except a few pieces, amounting to about \$270 in value.

The defendants then set forth *in extenso* the accounts between the parties, with a great variety of details and exhibits, and denied all manner of fraud or collusion.

A commission was then issued, under which was proved:

The bill of sale of 2d December, 1839, from C. B. & F. U., for and in consideration of the sum of \$10,000, in hand paid by A. A. & T. B., granted, bargained and sold to A. A. & Co., &c., "all the goods, merchandise and furniture, now remaining, standing and being in the store No. 95, in Baltimore St., and now in the occupation of us the subscribers, trading under the firm of C. B. & Co., that is to say, 250 pieces of silk goods, &c., as also all the outstanding debts, promissory notes and other evidences of debt, belonging to us, or any one of us, and all future proceeds and avails arising from sales of the goods of said store;" and provided, that in case I the said C. B. & Co., their, &c., shall well and truly pay to the said A. & Co. the said sum of \$10,000, with interest for the same, on or before the 2d March, 1840. Recorded on the 4th Dec. 1839. The bill of sale of the 16th August, 1837, from C. B. to Anthony Albers, was similar to that above, and was recorded on the day of its date.

419 * Under the commission, the proceedings of C. B. & F. U., as insolvent debtors, were also proved, with a great variety of accounts, notes, letters, schedules of goods, accounts of sales, and accounts current, were also proved to show the condition of the house of C. B. & Co., before, and at the time of failure, and the claims of the defendants as their creditors.

The complainant, in offering the proceedings of the two insolvents, C. B. & F. U., before the commissioners of insolvent debtors, limited his offer.

1. To show that they had made such application, and the time of making it.

2. To his due appointment and bonding as trustee.

3. To affect the credit due to the said insolvents, who were both sworn as witnesses for the defendant, and who vary in their statements as such witnesses, so far as their answers to interrogatories before the said commissioners may affect them.

The defendant excepted to the admissibility of the said proceedings, as evidence for any other purpose than that stated in the complainant's offer.

The Chancellor, [BLAND,] on the 20th of January, 1842, dismissed the bill with costs, being of opinion, that at the time of the execution of the deed of 2d December, 1839, by the debtors B. & U. to their creditors A. & R., that they had notice of the condition of insolvency of their said debtors, if they were then in fact in such a condition.

From this decree the complainant appealed.

The Act of 1825, ch. 50, declared that no mortgage or deed of that nature shall operate, either in law or equity, as a lien or charge on any estate or property whatsoever, for any other or principal sum or sums of money, than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned and expressed, to be secured thereby, at the time of executing the same.

The Act of 1834, ch. 293, entitled, "A further supplement to the Act, entitled, an Act relating to insolvent debtors in the * City and County of Baltimore, sec. 1, enacted, that in all cases of applications hereafter to be made for the benefit of insolvent debtors, under the Act to which this a supplement, or any supplement thereto, all conveyances, assignments, sales, deliveries, payments, conversions, or dispositions of property or estate, real, personal or mixed, debts, rights or claims, or confessions of judgment that shall be made, or caused or allowed to be made, whether upon request or otherwise, by any applicant to, or in favor, or with a view to the advantage or security of, and with intent to prefer any creditor or creditors, security or securities of such applicant, when such applicant shall have had no reasonable expectation of being exempted from liability or execution, for or on account of his debts, without

applying for the benefit of the insolvent laws as aforesaid, shall be deemed within the meaning and effect of the sixth section of the Act to which this is a supplement, to have been made with a view, or under an expectation on part of the applicant, of being or becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference; provided, however, that the provisions of this section shall not apply as against any person or persons claiming, by virtue of any assignment or conveyance, for valuable consideration, from or under the creditor or creditors, security or securities, their heirs, executors or administrators, nor to any case where the said creditor or security shall appear not to have had notice of the consideration of insolvency as aforesaid of said debtor.

The cause was argued before **ARCHER**, **DORSEY**, and **CHAMBERS**, JJ.

Cole and Reverdy Johnson, for the appellant.

Brune and McMahon, for the appellees.

ARCHER, J. delivered the opinion of this Court. The bill in the present case has been filed to vacate a deed of mortgage given by **Brecht** and **Uhthoff** to **Albers** and **Runge**, on the 2d day of December, 1839, to obtain an account and payment for the goods and promissory notes delivered over to * **Albers** and **Runge** in pursuance of said deed, and for the payment over to the complainants of the sum of three thousand two hundred and forty dollars, with interest, which was applied by **Uhthoff** (in contemplation of a partnership to be entered into by him with **Brecht**) to the payment of a debt due by **Brecht** to **Albers & Co.** **421**

The deed in controversy is alleged to be void as in violation of the insolvent laws, to be condemned at common law, and inoperative under the Act of Assembly of 1825, ch. 50, entitled "An Act to limit the operation and effect of mortgages."

There can be no pretence for considering the deed void by the insolvent laws existing anterior to the law of 1834, ch. 293, because, in our view, the evidence, taken in connexion with the answers, it is, by no means, satisfactory that the mortgagors, at the time of executing the deed, contemplated taking the benefit of the insolvent laws. The deed could not, therefore, be condemned as made with a view, or under an expectation, of being or becoming insolvent debtors, and with intent thereby of giving an undue and improper preference. Nor could it be set aside, within the meaning of those laws, since the decision of this Court in the case of *Crawford & Selman vs. Taylor*, being made at the request of the mortgagees.

It is, however, contended that the deed is void as being made in contravention of the Act of 1834, ch. 293, which, so far as regards the present question, appears to be a local law, confined to the City and County of Baltimore. This law provides that although the

transfer shall be made upon request, yet if the bargainor, at the time of conveyance, had no reasonable ground for believing that he would be exempt from execution or liability for his debts, without applying for the benefit of the insolvent laws, such conveyance should be considered as made with a view or under an expectation of being or becoming an insolvent debtor, and with intent thereby to give an undue and improper preference, provided the creditor obtaining the conveyance should appear not to have had notice of the condition of insolvency of such debtor.

Without stopping to enquire whether the debtors in this case had any reasonable expectation of exemption from * liability or
422 execution, on account of their debts, otherwise than by taking the benefit of the insolvent laws, it will be sufficient for us to say that we are satisfied that the mortgagees had not notice of the insolvent condition of the mortgagors. Our belief on this subject is derived from the fact that money was loaned and goods sold after the date of the deed, and that notes were taken for the payment of their debts to the creditors, Albers & Runge, in semi-monthly instalments; all which circumstances would not be likely to have occurred if the mortgagors had been considered as insolvent, or in such a condition that they had no reasonable expectation of being exempt from liability or execution for their debts, except by taking the benefit of the insolvent laws. No inferences can be drawn, prejudicial to the mortgagees, from the examination of the books of the mortgagors, by one of the mortgagees, because, as far as the character of that examination is disclosed by the testimony we cannot perceive that it was calculated to impart information in relation to the condition of the firm either as to solvency or insolvency. We have no evidence that enquiries had been made into the extent of the assets of the mortgagors, or the extent of their liabilities, by enquiry into which alone could any judgment have been formed, or any notice be attributed. And here we must be permitted to remark, that according to our construction of the Act under consideration, the notice which is to vitiate a conveyance is not a technical or constructive notice, but an actual notice, derived from a knowledge of the condition of the mortgagors.

The next subject submitted for enquiry is the validity of this deed at common law. Its invalidity on the mere ground of preference, cannot, upon legal principles, be urged, for a debtor has a right to prefer one creditor to another by the common law, and independent of our statutes, in relation to insolvent debtors.

The consideration proved, if the proof be admissible, establishes clearly a good and valid consideration to support the deed. The evidence *dehors* the deed is that the deed of mortgage was made to
423 secure advances made, and to be * made, to the extent of \$10,000. The consideration stated in the deed is \$10,000, in hand paid; and it is averred the deed is taken as a mortgage to

secure that sum. The only question, in this branch of the case, is whether this evidence is admissible. Evidence cannot be admitted which would have the effect of changing the character and legal operation of the deed, as in the case of *Hern & Soper*, where a deed purports to be made on a moneyed consideration it cannot be shown that money did not constitute the consideration, because this would have the effect to change the character of the deed; and in *Betts and the Union Bank*, it was decided that where a deed is impeached for fraud, and the consideration stated is money, it will not be allowable to set up a different consideration, as marriage, to support the deed. In such a case the effect of the evidence, if admitted, would have been to change the deed from a deed of bargain and sale to a covenant, to stand seized to the use of the grantee.

In the case now before us the admissibility of the evidence would produce no such result. The bill admits, and it is fully proved, that a moneyed consideration existed for the deed. Advances had been made to the mortgagors, though not to the extent mentioned in the deed; so that the instrument would, in contemplation of law, be a deed of bargain and sale, standing on the consideration proved in the same way as it would be if standing on the consideration expressed in the deed. In the case of *Betts and the Union Bank*, the evidence could not be received, because by the disproof of the consideration expressed, the deed had been rendered inoperative and void, and parol evidence of a different consideration could not be received to set up the deed thus impeached. But here the deed is not impeached or rendered inoperative and void, by the evidence offered, but the evidence is adduced to rebut any idea of fraud, by showing, not a different consideration, but the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. And this, it will be perceived, was the view of the case of *Betts and the Union Bank*, taken by this Court, in 9 G. & J. 91, and 10 G. & J. 248.

* The design of the law-makers in the passage of the Act of 1825, ch. 50, was to prevent liens on property, to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of its execution, and of which the deed, by its terms, gave no notice; as if a deed were executed to cover a mortgagee against all future liabilities of any and every description, which the mortgagor might incur or be responsible for, to the mortgagee. Under such a deed, what would have prevented the mortgagee from purchasing up claims at a depreciation against the mortgagor, to indefinite amounts, and thereby acquiring priority, to the prejudice of creditors. A practice prevailed anterior to the Act of 1825, ch. 50, of taking mortgages for specified sums of money, greatly below the value of the mortgaged premises, with a clause or clauses providing that the mortgaged premises should be held as a security for all future liabilities or advances by the mortgagee to the

mortgagor, by which means the creditors of the mortgagor were defrauded, sometimes by fraudulent combinations between the mortgagor and mortgagee, or by the acts of the mortgagee alone, who, after the known insolvency of the mortgagor, purchased up liabilities of the mortgagor at depreciated rates, and held them as liens on the mortgaged premises for their nominal amounts; thus excluding a portion of the creditors from an equal dividend of the mortgagor's estate. Creditors becoming such after date of such mortgage, were deluded and suffered loss, which no precaution could guard them against. Such transactions the law was designed to meet; but not a case like this, where the amount is stated; where the world is apprised of its limits, and where the parties design to cover all advances which may be made, to the extent of the sum limited in the mortgage. In the mortgage now under consideration, no one could be deceived or prejudiced.

The views which we have above taken, disposes of the various questions raised in the case, and concurring with the Chancellor in his judgment, we affirm his decree.

Decree affirmed.

425 * GEORGE GARDNER and JOHN HUGHES, Executors of ELIZABETH REEVES *vs.* JOSEPH E. SIMMES, *a. d. b. n.* of THOMAS C. REEVES.—December, 1843.

After a period of near fifteen years, in the absence of all proof to the contrary, the Orphans' Court, in reviewing the proceedings of an executor, should assume the payment of all debts and legacies. This presumption rests on the duty of the executor, and his due discharge of it. (a)

As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period, might depend on the peculiar circumstances of each case.

The Acts of 1793, ch. 101, and 1820, ch. 161, confer jurisdiction on the Orphans' Court to coerce the delivery over of property, or *choses in action*, or payment of money, by the representative of the executor or administrator to the administrator *d. b. n.* of the first deceased, only in case the property, *choses in action* or money, belonged specifically to the deceased while alive, and remained in the hands of the executor and administrator as such, and not as legatee; or in case the *chose in action*, &c. was received by the executor or administrator in that capacity, and was so retained until his death. (b)

(a) Approved in *Lark vs. Linstead*, 2 Md. 427; *Donaldson vs. Raborg*, 28 Md. 55.

(b) Cited in *Lemmon vs. Hall*, 20 Md. 171; *Donaldson vs. Raborg*, 26 Md. 326. When an executor or administrator dies without having made full administration and full distribution of the assets, administration *d. b. n.* is necessary, and the title of the distributees can be made in no other way. *Neal vs. Charlton*, 52 Md. 498; *Salisbury vs. Black*, 6 H. & J. 241. Lapse of time interposes no bar to the granting of such letters. *Neal vs. Charlton*.

In such cases the Orphans' Court may decree the delivery up of the specific property, so retained, but cannot decree its nominal or estimated value.

Property remaining specifically after the death of the original executor, or administrator, is unadministered property, and the appointment of an administrator *d. b. n.* in such case is indispensably necessary to give title to the distributees, even though all the debts are paid, and if, in such circumstances, the administrator of the first executor transfers the property to the distributees, their possession is liable to be divested by the subsequent grant of letters *d. b. n.* *Alexander vs. Stewart*, 8 G. & J. 145, note (d). Money remaining in the hands of an executor or administrator, in that character, at the time of his death, is subject to an order to pay over to the administrator *d. b. n.* under Rev. Code, Art. 50, sec. 109. *Donaldson vs. Raborg*, *supra*. Where the petition of an administrator *d. b. n.* claiming payment of a sum of money shown to be in the hands of a deceased executor by his last account alleged that he retained it in his hands unwasted, without necessity, that he blended it with his own private property, and made use of it for his own profit, it was held that such sum was subject to an order of the Orphans' Court to pay over by the executors of the deceased executor to the administrator *d. b. n.* *Ibid*. But in *Stewart vs. Ins. Co.* 58 Md. 571, the Court said that an administrator *d. b. n.* cannot maintain an action for a *devastavit* committed by a deceased or displaced administrator because such administrator, or his representative, is required to account directly to the persons beneficially interested in the estate. "To the administrator *d. b. n.* is committed only the administration of the goods, chattels and credits of the deceased which remain *in specie*, and have not been 'already administered.' Our statute limits his authority to the administration of such assets as have not been 'converted into money, and not distributed and delivered or retained by the executor or former administrator, under the direction of the Orphans' Court.' In view of this law, and the source from which it was borrowed, money received by the administrator and mingled with his own, or other assets sold, wasted, misapplied or converted to his own use, are regarded, so far as the rights and power of the administrator *d. b. n.* are concerned, as *already administered*, and hence he acquires no title to such assets, has no authority to bring an action against any one for their recovery, and cannot therefore sue for a *devastavit* committed by his predecessor in office." In *U. S. vs. Walker*, 109 U. S. 261, 265, it is said that an administrator *d. b. n.* is entitled to all the goods and personal estate which remain in specie. "Money received by the former executor or administrator, in his character as such, and *kept by itself*, will be so regarded, but if mixed with the administrator's own money, it is considered as connected, or as, technically speaking, 'administered.' Where personal property of an estate under administration has been sold, or a debt collected, the proceeds are not property of the decedent, but are the individual property of the executor or administrator, and he is liable to an action for not accounting." And it was accordingly held that an administrator *d. b. n.* is not entitled to demand of a removed administrator the proceeds of a claim against the U. S. due to the intestate and collected by the former administrator, and cannot maintain suit against the surety of such former administrator for failure to pay such sum to the administrator *d. b. n.* This case was decided without reference to a statutory provision like that contained in Rev. Code, Art. 50, sec. 109, authorizing the administrator *d. b. n.* to obtain from the representative of the deceased administrator "the money in

APPEAL from the Orphans' Court of Charles County. On the 26th October, 1841, Joseph E. Simmes, *a. d. b. n.* of Thomas C. Reeves, filed his petition in the said Court, claiming of the executors of the late Elizabeth Reeves, the property contained in list No. 1, and the money in list No. 2, and prayed the Court so to order and adjudge in his favor.

List No. 1. Property, the executors of E. R. have not paid over, for which the appellee holds them responsible, viz:

Negro man Gusty, carpenter.

Also various articles, as fodder, grain, horses, cattle, agricultural implements, tobacco, and household furniture, &c.

List No. 2. Of notes due the estate of T. C. R., all of which executrix believes to be good, \$1,140; judgments \$735; open accounts \$121.84.

The list of debts was proved by the executrix the 13th of March, 1826, before the register of wills.

The appellants answered the petition of the appellee, and alleged that Thomas C. Reeves died in the year 1826, having *first
426 made his last will and testament, and thereby devised one-half of his personal estate to his wife E. R. forever, and the other half to his said wife for life, and then over to Thomas Simmes and others; that E. R. took possession of all of said property, and used it as devised to her, and in the use of said property, all that mentioned in list number one was consumed and perished, except negro man Gusty; and said executors contend they are not responsible for said property, except for the value of said negro man at the time of Mrs. Reeves' death, which happened in 1840, and they pray the Court to award the value of said negro in 1840, to be paid to them by the said petitioner. And they further answer, that the said list of debts mentioned as list number two, was returned by E. R., as due the estate of T. C. R., but she has not said whether they are sperate or desperate, and they do not know whether they were collected or not, or how much, or what amount of said claims have been

his hands as such." In *Lemmon vs. Hall*, *supra*, the ruling was similar to that in *Donaldson vs. Raborg*.

An administrator *d. b. n.* cannot disturb the title of a purchaser, or claim the specific property acquired under an agreement made by his predecessor in the administration, which it was competent for such predecessor to make. *Hagthorp vs. Neale*, 7 G. & J. 9. An administrator *d. b. n.* is chargeable only with unadministered assets which come into his hands, and the fact that a former administrator may have confessed a judgment and thereby admitted a sufficiency of assets in his hands to pay the same does not preclude an administrator *d. b. n.* from pleading to a *scire facias* on such judgment, that the unadministered assets, for which alone he is responsible, are insufficient to pay the original judgment. *Kearney vs. Sasscer*, 37 Md. 277. Part payment by an administrator will take a claim out of the operation of the Statute of Limitations as against the administrator *d. b. n.* *Semmes vs. Young*, 10 Md. 242.

collected. They find the note of Thomas Simmes for \$600, dated 14th January, 1819, with the papers, and not paid. The respondents are not responsible for interest on said notes until the death of Mrs. Reeves, in 1840. They admit that said petitioner is entitled to a proportion of the hires of negroes the year of Mrs. Reeves' death, and are willing to pay the just and fair proportion of said hires over to petitioners.

The will of Thomas C. Reeves, filed with the answer, was dated on the 4th August, 1825, and proved on the 6th December of that year. It devised certain tracts of land to his wife in fee, and other land to her for life, and then all the rest and residue of his real estate, after other devisees of real property, to his wife in fee. The will then devised as follows :

"Item. I devise and bequeath to my beloved wife Elizabeth Reeves, the use of all the rest and residue of my personal estate, during her natural life, and at her death, one-half of said personal estate to her heirs forever ; one-third part of the remaining half of said personal estate, I bequeath to Thomas Simmes, and the residue to Elizabeth Gutterick, Susanna Reeves and other, to be equally divided between them.

The will constituted Elizabeth Reeves sole executrix.

* The Orphans' Court decreed that the administrator *d. b. n.* of Thomas C. Reeves is entitled to the sum of \$1,158, being 427 the value, at the time of the death of Elizabeth Reeves, of negro Gusty, and articles not belonging to E. R. absolutely, but in which she had a life estate only, with interest on the said sum from the death of the said E. R., and also to the sum of \$1,981.84, being the amount of good debts due to said Thomas C. Reeves, contained in Exhibit No. 2, with interest thereon from the time of the death of said E. R., and also to the hires of negroes belonging to the estate of T. C. R., from the time of the death of E. R. till the end of the year in which said Elizabeth died, for all the negroes hired out that year, at the rate they were hired, with interest thereon from the end of the year, and also for all other of said negroes held by the executors of E. R. from the time of her death until paid over to the administrator *d. b. n.* of T. C. R., with interest thereon from the time the negroes were paid over. And we further decree, that the executors of E. R. shall pay over and settle the said several sums of money and interest, to and with the said administrator *d. b. n.* of said T. C. R., and pay costs.

From which decree the executors of E. R. appealed to this Court.

The cause was argued before BUCHANAN, C. J., STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, JJ.

P. W. Crain and McMahon, for the appellants.

J. Johnson and R. Johnson, for the appellees.

CHAMBERS, J., delivered the opinion of this Court. The will of T. C. Reeves, by the clause which gave the residuum of his personal estate to his wife, passed to her an absolute interest in one moiety thereof, and an estate for her life in the other moiety. There is no allegation on the one side, nor admission on the other, that any of the debts or legacies were unpaid by Mrs. Reeves, the widow and executrix of T.

428 C. Reeves, in 1840, when she died. Letters testamentary * had been granted to her in 1825, and after a period of time little less than fifteen years, the Orphans' Court, or this Court, in reviewing its proceedings should assume the payment of all debts and legacies in the absence of proof to the contrary.

This presumption rests upon the ground that it was the duty of the executrix to discharge the debts in a due course of administration, and in the period within which, by law, she could be compelled to pay them, and then to pay and deliver the legacies bequeathed by the will. As to such legacies as were bequeathed to herself the law will assume that she held them as legatee after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded as such a period might depend upon the peculiar circumstances of each particular case, and we do not deem it necessary to define the minimum limit, it being sufficient to say in this case the period has been long enough to satisfy more than the largest demand in that respect. Mrs. Reeves must therefore be regarded as being in possession, as legatee, of whatever was bequeathed to her; and in that view of the case there is no room for the application to this case of the law claimed by the appellee. The Acts of 1798 and 1820, confer jurisdiction on the Orphans' Courts to coerce the delivery over of property or *chose in action* or payment of money by the representative of the executor or administrator to the administrator *de bonis non* only in case the property, *chose in action* or money belonged specifically to the deceased while alive, and remained in the hands of the executor or administrator as such, and not as legatee, or in case the *chose in action*, or money was received by the executor or administrator in that capacity, and was so retained in that character till the death of such executor or administrator.

In looking through the record we find one item in regard to which there may be collected from the answer of the appellants facts which may prevent the conclusion otherwise inferrible from the lapse of time that it was not held by Mrs. Reeves at the time of her death as executrix.

* In that answer it is said, "they find the note of Thomas **429** Simmes among the papers and not paid;" and the respondents go on to disclaim all obligation to pay interest on this, as on any and all the other, debts claimed by the petition; this debt or note of Thomas Simmes being one of the debts due to the testator Thomas C. Reeves, at the time of his death, and mentioned in the list of debts returned by his executrix. It is proper, therefore, that

the appellee should have the opportunity of proving, if the fact be so, that this note did remain in the hands of Mrs. Reeves, as executrix, at the time of her death, in which event the Orphans' Court will be authorized to decree its delivery to the appellee; but they cannot decree its nominal or its estimated value. Indeed, the Orphans' Court seems to have totally mistaken the whole scope and purpose of the Acts of Assembly in regard to their authority in this respect. In no event have they power or jurisdiction, under these laws, to decree the payment of value in such cases, but only the delivery of property and *choses in action* or payment of money specifically.

Decree reversed, and cause remanded.

* ELIZABETH CASEY'S Lessee vs. WILLIAM INLOES, JOSHUA INLOES, JAMES HOOPER, JONATHAN CHAPMAN and WILLIAM TYSON. (a)—June Term, 1844. **430**

A prevalent opinion, in the neighborhood of the premises claimed in an action of ejectment, even if known and adopted by the lessor of the plaintiff, as to her legal rights whether founded in error or not, does not, at law, prevent the running of the Statute of Limitations, nor repel the legal presumption of a grant arising from long continued, and acquiesced in, adverse possession.

A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land Office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant.

The rent-rolls are books which were kept in the several counties of the State, during the Proprietary Government, by officers called rent-roll keepers, and were designed to show, in the respective counties, the grants of land made by the Lord Proprietary, the names of the subsequent alienees thereof, of those who were in possession of the same, and the quit-rents with which they were chargeable.

An escheat patent is conclusive evidence of the fact of an escheat grant.

Extracts from the rent-rolls may tend to disprove possession under an escheat patent, in a particular person, at a given period, by not showing that such person, at such period, was in possession, nor that quit-rents were charged to him on account of such escheated lands, as also by showing that others were charged therefor.

Where a tract of land was patented in 1663, and no conveyance from the patentee, but a deed for the same land in 1685 was in proof, from W. to J., and another deed for the same land in 1689, from B. to T., with proof of title, from T. to the lessor of the plaintiff, who brought her action of ejectment in 1841, but no evidence that W., J. or B. had ever been in possession, or how W. or B. acquired or claimed title, the Court cannot

(a) See also, *Wilson vs. Inloes*, 11 G. & J. 238; S. C. 6 Gill, 121; *Hammond vs. Inloes*, 4 Md. 188; *Peterkin vs. Inloes*, 4 Md. 175.

be called upon to instruct the jury that they are bound to presume a deed from the patentee or those claiming under him, to W., or from J. to B. or his ancestor, for such tract of land; though it would have been competent to have required an instruction to the jury that they must presume a deed from the patentee, or those claiming under him, to B., from whom the paper or record title was perfect.

A continuous possession of twenty years or upwards, in a party, or those claiming under him, will authorize him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the Court to instruct the jury to presume such a conveyance.

No direct proof of possession in a given party can be reasonably expected after a lapse of one hundred and fifty years.

431 * The certificate of the surveyor of the county, made in 1698, that a tract of land began at a bounded white oak, standing in the line of a parcel of land formerly belonging to M., "and now in the possession of the aforesaid T." returned to the land office about nine years after a deed to T. is evidence of T's possession of the land referred to as formerly belonging to M. (b)

So proceedings in ejectment, commenced in 1704, by C. against H. the grantee of T. in which the premises sued for were described as late in the tenure and occupation of T., and the lessor of the plaintiff, recovered judgment upon title derived from H., are evidence that T. had been in possession, is confirmatory of the surveyor's certificate, and that H. was in possession at the institution of the suit.

A recital in a deed, dated in 1756, professing to be made by the son and heir-at-law of one joint tenant, conveying land to the surviving joint tenant, and declaring that he "now continues as survivor, seized, and yet is actually seized of such lands," is evidence in 1843, that such survivor was possessed at the date of the deed.

Where a plaintiff in ejectment deduces a regular paper title from two grantors, the possession of either, the other necessary circumstances concurring, will enable him to ask the presumption of a conveyance to the party in possession.

It is not universally true that possession of land is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence.

Possessions of modern date, susceptible of proof by living witnesses, may be within the general rule; but as to those of such antiquity, that the brevity of human life demonstrates that such proof cannot be had, these are not within the rule.

Certificates of public surveyors, entries in debt books, recitals in deeds of ancient date, are evidence to prove ancient possession of lands.

Facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, may be established by hearsay evidence.

A plaintiff in ejectment, who claims title under two grantors, is not estopped from setting up the paramount title of the one, or alleging that he derived no title from the other. (c)

The true principle of estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to con-

(b) Approved in *Peterkin vs. Inloes*, 4 Md. 188.

(c) Cited in *Spindler vs. Atkinson*, 8 Md. 422.

tract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the Court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed. (d)

The general principle is well established, that possession of a part of a tract or parcel of land, by him who is legally entitled to the entirety, carries with it possession to the extent of his legal rights; and no wrong-doer can, in contemplation of law, by entry, or the exercise of acts of ownership thereon, * acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive. (e) **432**

The grounds on which the presumption of a deed rests at law, are, that the rightful owner has so long submitted to acts of ownership over his property, exercised by another, without ever having sued for the recovery of his property, or damages for the unlawful invasion of his rights, that he is presumed to have granted them to him, by whom the acts of ownership are exerted. (f)

By the Act of 1745, ch. 9, sec. 10, "all improvements, of what kind soever, either wharfs, houses, or other buildings, that have or shall be made out of the water, or where it usually flows, (as an encouragement for such improvers,) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever." In the year 1693, a patent issued for a parcel land called M's Neck, lying in Chesapeake Bay, and on the N. side of a river called Patapsco, and on the N. side of the N. W. branch of said river: Beginning at a marked red oak by a little branch, and running up along the N. W. branch, for breadth, W. N. W. 100 p. over a cove unto a marked white oak. &c. **HELD:**

- 1st. That the patentee of this land, and those claiming under him, had by virtue of the Act of 1745, a mere privilege of acquiring property by its reclamation from the water; that until reclaimed, she had no property; no possession; no right, under that Act. (g)
- 2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of M's Neck claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted continuous possession, as was essential to the presumption of a grant to the person making and extending such fence. (h)
- 3rd. That being erected on navigable water, without the limits of the land owned by the patentee, it gave him no right of action.

(d) Cited in *Nutwell vs. Tongue*, 22 Md. 444. Cf. *Alexander vs. Walter*, 8 Gill, 239.

(e) Cited in *Hoye vs. Swan*, 5 Md. 253; *Armstrong vs. Risteau*, *Ibid*, 275; *Morrison vs. Hammond*, 27 Md. 618; *Parker vs. Wallis*, 60 Md. 18. See *Davidson vs. Beatty*, 3 H. & McH. 315.

(f) Cited in *Armstrong vs. Risteau*, 5 Md. 278; *Chemical Co. vs. Dobbin*, 23 Md. 219.

(g) Cited in *McMurray vs. Baltimore*, 54 Md. 110. See *Dugan vs. Baltimore*, 5 G. & J. 225, note.

(h) Cited in *Hoye vs. Swan*, 5 Md. 248; *Armstrong vs. Risteau*, *Ibid*, 278. 280; *Keener vs. Kauffman*, 16 Md. 307.

4th. That ejectment would not lie, there being no title in the land. (i)

5th. That trespass, in which the law implies an injury, whether sustained or not, could not be maintained for want of ownership in the soil. (k)

6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an Act, which is in itself a trespass. (l)

The principle, that where one stands by and sees another laying out money upon property, to which he has himself some claim or title, and does not give notice of it, he cannot afterwards in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties, but the principle applies only against one, who claims under some trust, lien or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice. (m)

Where defence is taken on warrant of resurvey, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots of the cause.

Where several defendants, in an action of ejectment, claim title to several and distinct parcels of the land sued for, as by separate and independent

433 leases, *and there is no evidence to show any possession in any person under whom two or more of the defendants claim to derive title, a presumption of a grant, founded on the possession of the claimant of one lot, cannot enure to the benefit of the claimant of a separate and distinct lot, of which no such possession had ever been held.

The presumption of a grant is an inference of law arising out of particular facts, and may exist, although the jury, in their consciences, may disbelieve the actual execution of any such grant. (n)

A prayer made in such form or terms that it would have a tendency to mislead the jury, as in the necessity of finding as a fact, what is an inference of law, should not be granted.

In a case where a jury may be authorized to presume a grant to defendants in possession, such presumption may be made, either of a grant from the plaintiff, or from any person under whom the plaintiff derived title, according to the proof.

Upon every discontinuance of the possession of a wrong-doer, by operation of law the possession of the rightful owner is restored, and nothing short of an actual adverse and continuous possession for twenty years can destroy his right, or vest a title in the wrong-doer. (o)

When a Court as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done upon principles of public policy, for the protection of ancient possessions. (p)

(i) Cited in *Leonard vs. Diamond*, 81 Md. 541.

(k) See *Norwood vs. Shipley*, 1 H. & J. 180, note.

(l) Cited in *Baltimore vs. St. Agnes*, 48 Md. 421.

(m) Approved in *Young vs. Frost*, 1 Md. 400; *Tongue vs. Nutwell*, 17 Md. 231; *Browne vs. Trustees*, 37 Md. 123; *Union Hall vs. Morrison*, 39 Md. 290.

(n) Cited in *Lannay vs. Wilson*, 30 Md. 551.

(o) Approved in *Armstrong vs. Risteau*, 5 Md. 275.

(p) Approved in *Chemical Co. vs. Dobbin*, 28 Md. 218; *Lannay vs. Wilson*, 30 Md. 551. See *Lloyd vs. Gordon*, 2 H. & McH. 158.

All that the law requires to raise the presumption is, that the possession should have been actual, adverse, exclusive, and continuous, and under claim of title.

A party cannot call upon the Court to instruct the jury where defence is taken on warrant, as to the effect of a patent not located upon the plats, nor given in evidence to the jury.

The Court cannot be called upon to say that an original patent must be construed by reference to its relation to another patent, founded on a resurvey of the same land, where the second patent did not appear in evidence, and where the same parties claimed under both patents.

Upon an escheat the State takes as the *ultimus hæres* of that, to which, the person was entitled, whose death, without heirs, created the escheat.

An escheat grant, in one sense of the term, is the creation of a *feudum novum*; the grantee takes the property granted as a new fief or feud, so far as regards his relationship, obligations, and duties to the State, and the estate, upon the terms specified in the grant.

But the limits, privileges, appurtenances, and priorities of the estate granted by escheat patent, and the liens and incumbrances to which it may be subjected, exist independently of the inquiry, whether the grant be of an ancient or a new feud.

The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs.

The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, * except so far as it may be affected by the doctrine of merger or extinguishment. **434**

An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat. (q)

The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued.

Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant. (r)

The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired.

An escheat grant is *prima facie* evidence that the land granted is liable to escheat, at the date of issuing the escheat warrant, and not antecedently. (s)

M. was patented in 1663. In 1734, J. including a part of M. was also patented, and in 1787 an escheat warrant and patent issued for M. The

(q) Approved in *Jones vs. Badley*, 4 Md. Ch. 168. See *Garretson vs. Cole*, 2 H. & McH. 305.

(r) See *Partridge vs. Colegate*, 3 H. & McH. 210; *Armstrong vs. Bittinger*, 47 Md. 103.

(s) Approved in *Wilson vs. Inloes*, 6 Gill, 161; *Peterkin vs. Inloes*, 4 Md. 188; *Goodwin vs. Caton*, 4 Md. Ch. 161. See *Hall vs. Gittings*, 2 H. & J. 99; *Armstrong vs. Bittinger*, 47 Md. 103.

two last patents were granted to F. under whose devisee, the plaintiff claimed M. by his deed of 1758. *Held*, that the conveyance passed M. as it was held under the original patent of 1663, be the effect of the patent of J. what it may. (t)

As far as regards any conflict of rights between the parties to this cause, the defendants, under the Act of 1745, had a right to extend westwardly in front of their lots to the west side of Caroline street and no further; and the lessor of the plaintiff had a right to extend her grounds to the City Dock; on the south side of Lancaster street.

A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment. (u)

The Act of 1745, ch. 9, never was designed to give one land holder the power of extending his improvements over the land of another. (v)

The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the Act of 1745, to make improvements.

The heir of lessee for a term of years of a lot bordering on the water, under the Act of 1745, ch. 9, sec. 10, is not the riparian proprietor of such lot. (w)

Where possession was essential to the acquisition of title to land, and title to the creation of a riparian right, any prayer founded on that right, which did not submit the fact of possession to the jury, should be rejected.

435 APPEAL from Baltimore County Court. * This was an action of ejectment, commenced by the appellant on the 20th August, 1841, who declared for all that lot or piece of ground on Fell's Point, in the City of Baltimore: Beginning for the same at the south-west intersection of Alice Anna street and Caroline street, and running westerly on Alice Anna street one hundred and seventy feet to Spring street, (formerly Petticoat alley,) and then southerly, bounding on the east side of Petticoat alley, or Spring street, to the water of the dock commonly called the City Dock, then easterly bounding on the water of said dock to Caroline street, then northerly bounding on Caroline street to the beginning, containing one and an half of land, more or less, with the appurtenances, situate and

(t) See the history of the titles involved in this case in *Hammond vs. Inloes*, 4 Md. 167.

(u) See *Browne vs. Kennedy*, 5 H. & J. 156; *Wilson vs. Inloes*, 11 G. & J. 234.

(v) Cited in *R. R. Co. vs. Chase*, 43 Md. 36; *Baltimore vs. St. Agnes*, 48 Md. 431; *Garitee vs. Baltimore*, 53 Md. 433. See *Dugan vs. Baltimore*, 5 G. & J. 225, note.

(w) Cited in *Williams vs. Baker*, 41 Md. 529.

being in Baltimore County aforesaid, which Elizabeth Casey had demised, &c.

The defendants pleaded not guilty, and took defence under the warrant of resurvey for all the land lying between the west side of Caroline street and the east side of Spring street, and the south side of Alice Anna street and the north side of Lancaster street.

1st Exception.—At the trial of this cause the plaintiff to support the issue on her side, offered in evidence the following papers, to wit:

A patent granted by the Proprietary of Maryland to Alexander Mountenay for Mountenay's Neck, dated 30th June, 1663.

A deed from Robert Blunt to James Todd, 4th October, 1695.

A deed from James Todd to John Hurst, of the 3rd March, 1701.

A deed from said Todd to Charles Carroll, of the 16th June, 1701.

And the deed of mortgage from John Hurst to Richard Colegate, of the 13th October, 1702.

A deed from said Hurst to Thomas Sheridine, Thomas Sligh, of the 19th March, 1749.

The will of Richard Colegate, 8th of August, 1721, devising Mountenay's Neck to his two sons, John and Thomas Colegate.

A deed from said John and Thomas Colegate to Thomas Sheridine and Thomas Sligh, of the 15th November, 1750.

* A deed from Thomas Sheridine to Thomas Sligh, of the 26th June, 1756. **436**

A deed from Charles Carroll to Thomas Sligh, of the 31st May, 1759.

A deed from Thomas Sligh to Thomas Hammond.

The grant of Alexander Mountenay for 200 acres in Patapsco River, Mountenay's Neck, described the land as follows, to wit:

A parcel of land called "Mountenay's Neck," lying in Chesapeake Bay, and on the north side of a river called Patapsco, and on the north side of the north-west branch of the said river: Beginning at a marked red oak by a little branch, and running up along the north-west branch, for breadth, west north-west one hundred perches over a cove unto a marked white oak, by a line drawn north-north-east running into the woods, for length, three hundred and twenty perches by a line drawn from the said north-north-east line, running east-south-east one hundred perches, by a line from the said east-south-east line running south-south-west unto the first marked red oak three hundred and twenty perches, containing and now laid out for two hundred acres, more or less; together with the rights, profits and benefits thereunto belonging, (royal mines excepted.) To have and to hold the same unto him the said Alexander Mountenay, his heirs and assigns forever, &c.

Robert Blunt to James Todd, in fee. This indenture describes the land as all that parcel of land called "Mountenay's Land," lying on the north side of the Patapsco River, in the Province afore-

said: Beginning at a marked red oak, by a little branch, and running up the north-west branch west-north-west one hundred perches, over above to a marked white oak standing on a point, then running north-north-east into the woods three hundred and twenty perches, then running east-south-east one hundred perches, then running south-south-west three hundred and twenty perches to the first marked tree, for two hundred acres of land, more or less; together with all the profits, rights and benefits thereunto belonging, or in any wise appertaining. To have and to hold, &c.

437 * James Todd deed to John Hurst. This indenture described the land conveyed by it in fee as one hundred and thirty-five acres and one-half of one acre of land, being part of a certain tract or parcel of land called and known by the name of "Cole Harbor," lying and being in the county aforesaid; and also one hundred and sixty and four acres and one-half of an acre of land, being part of another tract or parcel of land formerly belonging to Alexander Mountenay, late of the aforesaid county and Province, deceased, and purchased by the said James Todd: Beginning at a bounded white oak on a point, being the first bounded tree of Cole Harbor, by the north-west branch, and running down the river or branch east-south-east, for breadth, one hundred and forty perches to a locust post on a little point, and then with a line drawn north-north-east with the line of Mountenay's Land, for length, two hundred and twenty-four perches to a bounded white oak standing in the said line, then with a line drawn west-north-west one hundred and forty perches to a red oak standing in the north-north-east line of the said land of Mountenay's, then running with the said land south-south-west fifty-six perches to a white oak, then with a line drawn north-west, two degrees south, for the length of two hundred and four perches to a gum tree standing near the said branch, then with a line drawn south-south-west seventy-five perches to a white oak standing in the corner of the old field by the falls or branch aforesaid, then with a line drawn south-east and by south to the said branch and with the said branch south-east, and by south to the first bounded tree, surveyed and laid out for three hundred acres of land, more or less, to be holden of the manor of Baltimore; together, &c.

James Todd deed to Charles Carroll. This indenture, made the sixteenth day of June, in the year of our Lord one thousand seven hundred and one, between James Todd of Baltimore County, gentleman, and Penelope his wife, of the one part, and Charles Carroll of Anne Arundel County, gentleman, of the other part. Whereas the above said James is seized in fee simple of three several tracts of the land, all lying in Baltimore County, one called Todd's Range, and originally laid out * for five hundred and ten acres; another called Mountenay's Neck, containing two hundred acres, and the third called Bold Venture, containing one hundred and sixty acres, all of

which said tracts or parcels of land are contiguous one to another. And whereas the said James has covenanted with one John Hurst, of the said County of Baltimore, to convey and make over unto him and his heirs, one hundred and fifty acres out of the said tract called Mountenay's Neck, and one hundred acres out of the said tract called Todd's Range.

Now this present indenture witnesseth, that the said James and Penelope his wife, &c., have given, &c., the said Charles Carroll, and his heirs, all that the remaining part of the said tract of land called Mountenay's Neck, as also all that the remaining part of the said tract called Todd's Range, as also all that entire tract called Bold Venture, with all, &c. To have and to hold the said remaining part of the said two tracts called Mountenay's Neck and Todd's Range, as also all that entire tract called Bold Venture, with all and singular the appurtenances thereunto belonging, or in any wise appertaining, unto him the said Charles Carroll, his heirs and assigns forever, &c.

John Hurst mortgage to Richard Colegate of one hundred thirty-five acres and one-half part of an acre of land, being part of a certain tract or parcel of land called and known by the name of Cole Harbor, lying in the county aforesaid; and also one hundred sixty and four acres and one-half part of an acre of land, being part of another tract or parcel of land formerly belonging to one Alexander Mountenay, late of the aforesaid county and Province, deceased, and purchased by James Todd of the aforesaid county, gentleman: Beginning at, &c.

John Hurst conveyance to Thomas Sheridine and Thomas Sligh. This indenture, made the nineteenth day of March, seventeen hundred and forty-nine, between John Hurst of, &c., of the one part, and Thomas Sheridine and Thomas Sligh of, &c., of the other part, witnesseth that the said John Hurst, for &c. by these presents hath given, granted, &c., unto them the said Thomas Sheridine and Thomas Sligh, their * heirs and assigns, one hundred thirty-five acres of land and one-half part of one **439** acre of land being part of a tract of land called and known by the name of Cole's Harbor, lying in the county aforesaid; and also one hundred sixty-four acres and one-half part of an acre of land, being part of another tract or parcel of land formerly belonging to one Alexander Mountenay, late of the county and Province aforesaid, deceased, and purchased by James Todd of said county, gentleman: Beginning at, &c.

The will of Richard Colegate, dated 8th August, 1721, and proved 6th February, 1721, devised as follows:

And I also give my said sons John and Thomas, three hundred acres of land, being part of Cole's Harbor and Mountenay's, (which land I had of John Hurst,) and all the houses, orchards and corn fields to them, or either of the said tracts, belonging, to be equally divided between them and their heirs and assigns forever.

John Colegate and Thomas A. Colegate conveyance to Thomas Sheridine and Thomas Sligh, dated 15th Nov. 1750, for the land mentioned in their father's will in fee.

Thomas Sheridine to Thomas Sligh. *To all to whom these presents shall come, greeting* : Whereas, a certain John Colegate and Thomas Colegate did, by indenture bearing date on or about the fifteenth day of November, in the year one thousand seven hundred and fifty, and made, or mentioned to be made, between the said John Colegate and Thomas Colegate of the one part, and Thomas Sheridine's late father, deceased, a certain Thomas Sligh of the other part, for and in consideration of one hundred pounds, sterling money, to them the said John Colegate and Thomas Colegate in hand paid, at or before the sealing and delivery thereof, grant, &c., unto them the said Thomas Sheridine and Thomas Sligh, their heirs and assigns forever, all that part of two tracts or parcels of land called Todd's Range or Cole's Harbor and Mountenay's Neck, situate, &c.: Beginning for the part thereby conveyed or mentioned, or intended to be, of the aforesaid tract or parcel of land, at a bounded white oak 440 on a point, being first bounded * tree of Cole Harbor, by the north-west branch, and runs down the river or branch east-south-east, &c. And whereas, my said late father, Thomas Sheridine, after being jointly with the aforesaid Thomas Sligh, by virtue of the conveyance aforesaid, seized and possessed of the aforesaid piece or parcels of land hereby conveyed, or mentioned so to be thereof, on or about the 29th day of May, 1752, died so seized and possessed, living the aforesaid Thomas Sligh, who survived my said late father, and who now continues as survivor, seized, and yet is actually possessed of the aforesaid three hundred acres of land. And whereas, I am eldest son and heir-at-law of the said Thomas Sheridine, deceased, for which reason the said Thomas Sligh is desirous of having conveyed to him my right or claim which I may have to the said three hundred acres of land, so as aforesaid conveyed. Now know ye, that I, Thomas Sheridine, son and heir of the aforesaid Thomas Sheridine, deceased, for and in consideration of the sum of fifty pounds sterling money, by the said Thomas Sligh to me in hand paid, have remised, released and forever quit-claim unto him the said Thomas Sligh, his heirs and assigns forever, all that the aforesaid three hundred acres of land.

Charles Carroll deed to Thomas Sligh, 150 acres, part of Mountenay's Neck and Todd's Range. This indenture, made the thirty-first day of May, in the year of our Lord one thousand seven hundred and fifty-nine, between Charles Carroll, of the City of Annapolis, in Anne Arundel County, Esq., of the one part, and Thomas Sligh, of Baltimore County, merchant, of the other part, witnesseth; whereas, Charles Carroll, Esq., late of the City of Annapolis and County of Anne Arundel aforesaid, deceased, by his last will and testament in writing, bearing date the 1st day of December, 1718, amongst other

things therein contained, bequeathed all his lands in Baltimore County to his sons Charles and Daniel, as also all his mortgages, as by the said will, duly proved and recorded, may appear. And the said Daniel Carroll, by his last will and testament in writing, bearing date the 12th day of April, 1734, did will and authorize Charles Carroll, party to this deed, to * sell all his lands which should not in any one tract exceed five hundred acres, as by the said will 441 and testament duly proved and recorded may appear.

Now this indenture witnesseth, that the said Charles Carroll, for, &c., to him in hand paid by the said Thomas Sligh, &c., unto him the said Thomas Sligh, his heirs and assigns, all the northernmost end of a tract of land called Mountenay's Neck, beginning at the end of two hundred and twenty-four perches in the easternmost line of the said land, and running thence north-north-east seventy-six perches; then west-north-west one hundred and forty perches; then south-south-west seventy-six perches; then east-south-east one hundred and forty perches to the beginning. And all that part of Todd's Range, except thirteen and a half acres, which he hath already agreed to exchange with the said Thomas Sligh, beginning at the end of the south-south-west seventy-six perches course, of part of Mountenay's Neck above mentioned, and running thence south-south-west fifty-six perches; then north-west one hundred and forty perches; then east one hundred and forty perches to Mountenay's Neck; then to the beginning, containing one hundred and fifty acres, more or less; together with all the rights, profits, benefits, privileges and appurtenances thereunto belonging or in any wise appertaining. To have and to hold unto him the said Thomas Sligh, his heirs and assigns forever.

Thomas Sligh deed to Thomas Hammond, 14½ a. pt. Mountenay's Neck. This indenture, made the thirty-first day of January, in the year of our Lord one thousand seven hundred and fifty-nine, between Thomas Sligh, of the one part, and Thomas Hammond, of, &c., of the other part, witnesseth, that the said Thomas Sligh, for, &c., hath given, &c., unto him the said Thomas Hammond, his heirs and assigns forever, all that part of a tract or parcel of land called Mountenay's Neck, lying, &c., beginning for the part hereby bargained and sold, at a bounded post set up for the beginning boundary of the whole tract called Mountenay's Neck, standing near the eastern shore side of the north-west branch of Patapsco River, and running thence north-north-east fifty-four perches and fourth part * of a perch, north forty-seven degrees west, forty-five perches and 442 three-fourths part of a perch, unto Peter Lettick's part of said land; then bounding on said Lettick's part, south twenty-one degrees and fifteen minutes, west fifty-seven perches unto the aforesaid north-west branch of the Patapsco; then bounding on the said north-west branch the two following courses, viz: south sixty-eight degrees east, sixteen perches; south thirty-two degrees east, twenty-two perches and half a perch, until it intersects the first line of the whole tract,

and then bounding on that line reverse of the same to the beginning post, containing fourteen acres and one-fourth part of an acre, more or less.

And the plaintiffs further proved that the said Thomas Hammond died before the Revolution, leaving William Hammond his eldest son and heir-at-law, and that he inherited all the real estate of his father Thomas.

And further offered in evidence two deeds from said William Hammond to John Cornthwaite, of the 20th December, 1775, and of the 2nd April, 1779; two deeds from John Cornthwaite to John Hammond, of the 24th December, 1779, and of the 7th June, 1780; a deed of trust from John Hammond to John Anderson, of the 4th of March, 1795.

William Hammond to John Cornthwaite. Conveyance. This indenture, made this twentieth day of December, seventeen hundred and seventy-five, between William Hammond, of, &c., shipwright, of the one part, and John Cornthwaite, of the same place, merchant, of the other part, witnesseth, that the said William Hammond, for, &c., hath granted, &c., unto him the said John Cornthwaite, his heirs and assigns forever, all that piece or parcel of land situate, lying and being in the southeast addition to Baltimore Town, being part of a tract or parcel of land called Mountenay's Neck, and is contained within the following metes and bounds, courses and distances, viz: Beginning for the part hereby bargained and sold at the northwest corner of Caroline street and Wilkes street, and running thence along Wilkes street westerly seventy feet; thence southerly parallel with Caroline street to the out-line of the said tract *of
443 land called Mountenay's Neck; thence running and bounding therewith to Caroline street aforesaid; and thence by a straight line to the beginning; together with all, &c.

William Hammond to John Cornthwaite. This indenture, made this second day of April, seventeen hundred and seventy-nine, between William Hammond, of, &c., shipwright, of the one part, and John Cornthwaite, of the same place, merchant, of the other part. Witnesseth, that the said William Hammond, for, &c., hath granted, &c., unto him, the said John Cornthwaite, his heirs and assigns forever, all that piece, part or parcel of land, situate, lying and being in the southeast addition to Baltimore Town, being a part of a tract of land called Mountenay's Neck, and is contained within the following metes and bounds, courses and distances, viz: Beginning for the part hereby bargained and sold at the end of seventy feet westerly from the northwest corner of Caroline and Wilkes street, and running thence along Wilkes street, westerly, one hundred feet to Petticoat lane; thence running and bounding on Petticoat lane, southerly, into the water; thence running and bounding on and with the water, easterly, parallel with Wilkes street one hundred feet, to that part of the said land by the aforesaid William Hammond heretofore sold to

the said John Cornthwaite; and then running and bounding therewith by a straight line to the beginning, together with all, &c.

The two deeds from John Cornthwaite to John Hammond, conveyed the lots described in the two preceding deeds from William Hammond to John Cornthwaite.

John Hammond to John Anderson. Deed. This was a conveyance in trust, dated 4th March, 1795, reciting, amongst other matters: "And whereas, a marriage is intended shortly to be had and solemnized between the said John Hammond and a certain Elizabeth Anderson, the sister of the above named John Anderson, and the said John Hammond being desirous of conveying the above described ground in trust for the use of the said Elizabeth Anderson, his intended wife, after his decease, and for the other uses hereinafter mentioned, he the said John Hammond hath agreed to execute these presents;" and in * consideration thereof conveyed the legal estate to John Anderson, in fee, in trust for the use of John 444 Hammond, for life, without impeachment of or for any manner of waste, and also with such power of leasing as is hereinafter contained. "And from and immediately after the decease of the said John Hammond, then to the use and behoof of the said Elizabeth Anderson, if she shall survive him, and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste, and also with such power of leasing as is hereinafter contained, and from and immediately after the determination of the said several estates, then to the use of the said John Anderson and his heirs during the lives of the said John Hammond and Elizabeth Anderson, and the life of the survivor of them, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries or bring actions as occasion shall require; but nevertheless to permit and suffer the said John Hammond and his assigns during his life, and after his decease the said Elizabeth Anderson, (if she shall survive him, and her assigns during her life,) and from time to time to receive and take the rents, issues and profits of the said premises to and for his, her and their own use and benefit respectively, and from and immediately after the decease of the survivor of them, the said John Hammond and Elizabeth Anderson, to the use and behoof of all and every the children of the said Elizabeth Anderson, by the said John Hammond lawfully to be begotten, to be equally divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns forever; but if any of the said children shall not have arrived at the age of twenty-one years at the decease of their said parents, then upon his further trust," &c.

And the plaintiff also proved that John Hammond intermarried with the plaintiff in this case soon after the execution of the said last mentioned deed; that she was the sister of said John Anderson;

that John Anderson died about the year 1805, and John Hammond soon after him.

445 * The plaintiff further offered in evidence the permission to John Hammond, of the Baltimore Port Wardens, to extend his ground to the south side of Aliceanna street, dated 11th September, 1784; also the patent of Todd's Range, 1st June, 1700, viz:

"At a meeting of the Baltimore Port Wardens, Baltimore, September 11th, 1784, present, Samuel Purviance, president, John Sterett, Samuel Smith, Thomas Elliot, Richard Ridgely, Thos. Russell, Daniel Bowly, William Patterson, Robert Henderson. The board took into consideration the application of John Hammond, and thereupon ordered, that John Hammond shall be permitted to extend his wharf in a south direction, parallel with Caroline street, to the south side of Aliceanna street extended, he, the said John Hammond, engaging to leave the width of Aliceanna street open forever hereafter as a public highway."

And the patent to James Todd, for Todd's Range, dated 1st June, 1700, for all that tract or parcel of land heretofore called by the name of Cole's Harbor, but now called Todd's Range, "beginning at a bounded white oak, standing in the line of a parcel of land formerly belonging to Alexander Mountenay, and now in the possession of the aforesaid Todd, and running west to a bounded red oak standing by a small branch called the Spring Branch, then more west seventy-five perches, to a double white oak, in all containing three hundred and twenty perches; then north-northeast, two hundred and seventy-five perches to a red oak, being a bound tree of the aforesaid Mountenay's land, and then south-southwest with the said Mountenay's line to the first bounded tree, containing and now laid out for five hundred and ten acres, more or less, according to the certificate of survey thereof, taken and returned into our Land Office, bearing date the seventeenth day of February, one thousand six hundred and ninety-eight, and there remaining, together with all the rights, profits, benefits and privileges thereunto belonging, (Royal Mines excepted.) To have and to hold, &c.

446 * The plaintiff also offered a record of a judgment and recovery in ejectment in the Provincial Court, of *Yoakley and Company's Agent, Lessee vs. John Hurst*, April Session, 1705, for "the three hundred acres of land aforesaid, lying in the county aforesaid, and late in the tenure or occupation of James Todd, of the aforesaid county, planter, beginning at a bounded white oak on a point, being the first bounded tree of Cole Harbor, by the northwest branch, and running down the river or branch, east-southeast, for breadth one hundred and forty perches, to a locust post on a little point, and then with a line drawn north-northeast, with the line of Mountenay's land, for length of two hundred twenty-four perches to a bounded white oak, standing in the said line, then with a line drawn west-northwest one hundred and forty perches to a red oak, standing in

the north-northeast line of the said land of Mountenay's, then running with the said land south-southwest fifty-six perches to a white oak, then with a line drawn northwest two degrees south, for the length of two hundred four perches to a gum tree, standing near the said branch, then with a line drawn south-southwest seventy-five perches to a white oak, standing in the corner of the old field by the falls or branch aforesaid, then with a line drawn southeast and by south to the said branch, and with said branch southeast and by south to the first bounded tree."

And also offered in evidence a certified extract from the debt books, viz:

I hereby certify that in the debt book for Baltimore County, for the year 1754, in page 21, there is the following entry, viz:

Rent.

Thos. Sligh, Dr. part of Mountenay's Neck, 100 acres...£0 4 0

Also in the debt book for said county, for the year 1755, in page 22, is the following entry, viz:

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

Also in the debt book for said county, for the year 1756, in page 24, is the following entry, viz:

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

* Also in the debt book for said county, for the year 1757, in page 19, is the following entry: 447

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

Also in the debt book for said county, for the year 1758, in page 23, is the following entry:

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

Also in the debt book for said county, for the year 1759, in page 20, is the following entry:

Thos. Sligh, Dr. part of Mountenay's Neck, 184 acres...£0 7 4

Part of Mountenay's Neck and Todd's

Range, 150 acres..... 0 6 0

Also in the debt book for said county, for the year 1760, in page 20, is the following entry:

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

Also in the debt book for said county, for the year 1761, in page 19, is the following entry:

Thos. Sligh, Dr. part of Mountenay's Neck, 200 acres...£0 8 0

Also in the debt book for said county, for the year 1762, in page 19, is the following entry:

Thos. Sligh, Dr. part of Mountenay's Neck, 184 acres...£0 7 4

Part of Mountenay's Neck and Todd's

Range, 150 acres..... 0 6 0

Also in the debt book for said county, for the years 1763, 1764, 1765, 1766, 1768, and 1769, in page 19, are the following entries, viz:

Thos. Sligh, Dr. part of Mountenay's Neck, 184 acres...£0 7 4

Part of Mountenay's Neck and Todd's

Range, 148 acres..... 0 5 11

The plaintiff further proved that some time after the death of the said John Hammond, the plaintiff in this case intermarried with a certain Robert Casey, who departed this life some time before the impetration of the writ in this case.

The plaintiff further offered in evidence the lease from John Hammond to Thomas McDowal, dated the 8th February, 1798, for the lot marked No. 10 on the plat.

The plaintiff also offered in evidence the ordinance of the Mayor and City Council, of the 11th March, 1823.

448 * The plaintiff further, by Ephraim Smith and others, offered in evidence the plots and explanations in this case, and proved that the location of the above deeds, patents, record and permission were correctly made thereon; and proved that John Hammond, during his life-time, filled up and improved a part of his lot on the east side of Caroline street, fronting on water, and in this way, and by a wash that came down Caroline street, a bar was made above ordinary high-water mark, which extended in part to the property leased to McDowal; that after this lease McDowal continued to fill up his lot until about the year 1800, when he erected a house and enclosed it with a board fence; that the ground at the time when it was thus enclosed was raised above ordinary high tide, and that it has remained in that condition until the present time; that John Hammond, during his life-time, and the plaintiffs since his death, have collected the rent of the property leased to McDowal; that the northern blue shaded line, beginning at A, shows correctly where the water ran at ordinary high tides in 1783. And the more southern blue shaded line, beginning at C, show the water line in 1801; that the water continued to flow nearly in the same way until the year 1824, with the exception of the improvement and filling up made by Hammond and McDowal, as above mentioned. That there was a great wash that came down Caroline street, crossing the square of the plaintiff from the southeast intersection of Fleet and Caroline streets, and flowing in a southwesterly direction towards Spring street, where it intersects Aliceana street; that the deposits of this wash was very considerable, and the effect of it was to render the water on the upper part of the square of ground above Aliceana street much shallower than it was before, so that there was on each side of the wash a mud flat, that was left nearly bare at low tides, but the water was shallower above than it was at Aliceana street; that the wash down Caroline street was diverted in an easterly direction from the cove in 1808, when the deposit was stopped; that along the north side of Lancaster street there was filling up by the city before any was done north of it, and that along that line

449 * there were considerable deposits of earth made at places, the water running in the intervals between them; that this was

four or five years before the city began to fill up above ; that along Harford run there was a good deal of deposits by alluvion at that period, so that Harford run could not be passed through except by tunnels ; that John Hammond was in possession of the property from Wilkes to Fleet streets, and filled it up east and west of Caroline street, and collected the rents from McDowal's house, and Mrs. Casey since his death ; that McDowal built a house about the year 1800, a year or two after he got his lease, on the ground marked on the plat leased by him from Hammond ; and further, on cross-examination, proved that William Inloes' fence could not be seen from Wilkes street ; that the logs of the fence did not join Inloes' ground, but commenced rather eastwardly of Caroline street, and by said Smith ; that the old people used to laugh at Inloes for putting it up ; that one Spencer had a fence extended from a point west of Spring street towards Canal street ; that Spencer's fence and Inloes did not join, and that Inloes' fence did not go as far as Spring street.

And the plaintiff further offered evidence by James W. Collins, that he was City Commissioner and Port Warden in the year 1823 : that in that year the whole north line of Lancaster street from Canal street east to west side of Caroline street, had been for some time logged ; that along the line there are deposits of earth thrown there by the mud machines, and that the mud running over had gone toward filling up the ground immediately north of the north line of Lancaster street, and to fill up at the east side of Caroline street very little ground showed, except at the corner of Canal street ; that there was an opening at Caroline and Lancaster streets, through which scows went ; that from Lancaster st. northerly above Aliceana street (with the exception of the ground projecting as marked on the plat as Inloes' ground, near the corner of Aliceana street and Strawberry alley,) the water ran in 1823 along the eastern side of Strawberry alley, and was deep there, and that the water covered the ground (except where there were * the deposits aforesaid, which did not extend to Aliceana st.) northerly **450** from Lancaster street beyond Aliceana and westerly of Strawberry alley ; that he left the work of filling up in 1829 ; that the ground had been thrown over the north side of Lancaster street, but had not in 1829 filled up as far as Aliceana street ; that he saw nothing of William Inloes' fence in 1823.

And the plaintiff further proved by William Davy, that he married in the family of Thomas Hammond, having married the daughter of William Hammond, who was the eldest son of Thomas ; that Thomas died before the Revolution, and that William, as the eldest son inherited his estate under the English law ; that Thomas Hammond had two sons, was a sea captain, and died in Boston ; that he lives at the corner of Bond and Wilkes streets, and has lived there many years, and knows how the water ran in 1819 ; that Caroline street was lower than Strawberry alley, and the water would run through

it high up; that the filling up along Aliceana street and Caroline street, was completed four or five years ago in a proper state for passing from Fleet street down to Aliceana street. Six or seven years ago the ground from Lancaster to Aliceana street was not yet filled up; that the fence of William Inloes was put up between 1808 and 1812; that the water at high tide ran over it, and the tide was enough to break it down with ice, and that it broke away at times and was kept up by repairs seven or eight years; and that he does not know that it remained until the city filled up; that it was before the war that he saw it last renewed; that it was a trifling affair to stop the mud; that boats could, in a smart tide, go over it; that it extended westerly about two or three hundred feet, but not west of Spring street; that it was made of stakes driven down into the mud seven or eight inches wide and about an inch thick; that the stakes did not go up to the land, and that between them and the land there were logs which went about half a square, and about sixty feet out; that there was no wash where the logs were; that the wash ran down Caroline street to Inloes' fence, and was by it turned westerly of the fence; that he saw Inloes repairing his fence two or three times; that * Inloes said he wanted to go to Eden street to fill up his
451 lot; that witness built houses for Inloes on Aliceana street, west of Strawberry alley; that he knew Joshua Inloes' wharf; that the water was deep at its north and south sides, and that vessels could come up to it, carrying seven or eight feet depth of water; that William Hammond died in 1783 or 1784; that before he died he had sold nearly all his property; that he left a son Thomas and three daughters, and that this Thomas died, while a boy, in the year 1797.

The plaintiff further offered proof by Joseph Owens, that in the year 1819 he was appointed City Commissioner and Port Warden, and so continued until 1825; that in 1823 the water flowed to the eastern side of Strawberry alley, above Aliceana street and from Lancaster street, and was deep there; that he acted as City Commissioner under the Ordinance of 1823 for filling up the cove, and under the ordinance contracted with parties for filling up to the extent as required according to the ordinance by the Commissioner of Health, the limits for the filling up were, (as shown by witness on a plat, now exhibited, made by the city,) along the eastern side of Strawberry alley, extending northerly, but not as far westerly as between Caroline and Spring streets. Cross-examined, he says, that the owners of ground south of William Inloes' lot entered into contracts under the ordinance for filling up; that he does not remember that any improvements or filling up was, under the Ordinance of 1823, directed by the Board of Health to be made in front of the grounds on Wilkes street; that he does not remember calling on Mrs. Casey as an owner of ground on Wilkes street, nor on what owners there he called; that the depositing of mud could have been

seen from Wilkes street; that no notice was given by any one owning lots on Wilkes street, not to go on with the filling up.

The defendants, to prove the issue on their part, offered in evidence the following patents, deeds and other papers, to wit :

The escheat patent of Mountenay's Neck, dated 7th July, 1737.

The patent of Island Point to said Fell, dated 15th June, 1734.

* The will of William Fell, (the elder,) dated 12th January, 1746. **452**

Deed of Edward Fell to Thomas Sligh, dated 19th August, 1758; also, deed from Samuel Wheeler and wife to David Jones, 22nd March, 1685.

The patent of Bold Venture, dated 20th March, 1695.

The escheat certificate of Mountenay's Neck, dated 14th April, 1737.

The patent of Long Island Point, dated 10th July, 1671.

The certificate of Fell's Prospect to Edward Fell, dated 20th May, 1761.

The following is a copy of the patent of Mountenay's Neck in the case of *Rogers et al., Lessee vs. Moore* :

William Fell's Patent—200 acres Mountenay's Neck. Charles, &c. Know ye, that whereas William Fell, of Baltimore County, by his petition to our agents for management of land affairs within this Province, did heretofore set forth that there was escheat unto us a certain tract or parcel of land, called Mountenay's Neck, lying and being in the county aforesaid, originally, on the 30th day of June, 1663, granted unto a certain Alexander Mountenay, for two hundred acres under old rent: that afterwards, on the 22nd of March, 1685, a certain Samuel Wheeler and Ann, his wife, by their indenture of bargain and sale, conveyed the said land to a certain David Jones, who died therefore possessed, intestate, and without heirs, by which means, or for want of heirs of the said Alexander Mountenay, or regular conveyances from the first taker up, the same is become escheat unto us as aforesaid, and the petitioner being the first discoverer thereof, humbly prayed to be admitted to its purchase, be the same escheat by the means aforesaid, or by any other ways or means whatsoever, and, &c.

We do therefore, in consideration thereof, and other the premises, hereby give, grant and confirm unto him the said William Fell, all that the aforesaid tract or parcel of escheat land, now resurveyed, and called Mountenay's Neck, lying and being in the county aforesaid: Beginning at a bounded white oak standing on the north side of the north-west branch * of Patapsco River, and near the mouth of a small branch descending into the north-west branch, which tree was bounded by commissioners appointed to examine evidences concerning the bounds of the same tract of land, at the place where the original beginning tree did stand, and running thence up the said north-west branch and over the mouth of a cove **453**

west-north-west one hundred perches to a bounded red oak, at or near the place whereat the second bounded tree did stand, thence north-north-east three hundred and twenty perches, east-south-east one hundred perches, and thence south-south-west, (as expressed in the grant,) unto the beginning, containing and laid out for two hundred acres, more or less, according to the certificate of resurvey thereof, taken and returned into our land office, bearing date the 27th day of April, 1737, and there remaining, together with, &c.

William Fell—Patent—85 acres—Island Point. Charles, &c. Know ye, that whereas, Carroll, of the City of Annapolis, in Anne Arundel County, Chirurgion, by his humble petition to our agent for management of land affairs within the Province, did heretofore set forth that a certain William Poultney, of Baltimore County, died, was possessed of a tract of land called Island Point, situate on a branch of Patapsco River, granted unto the said Poultney for one hundred acres, by patent bearing date the 10th day of July, *Anno Domini* 1671, and died thereof possessed *Anno Domini* 1674, and although an alien, made a will and devised the same to Edward Monfrett, likewise an alien, in the words: "Item. I give and bequeath unto Edward Moufrett, of Patapsco, all my lands, goods and chattels;" whereby the said Monfrett, as the petitioner conceived, had but an estate for life, although that he the said Poultney was capable of devising the said land, and that after the decease of the said Monfrett, the said land would come to the heirs of the said Poultney; but so it was, that no heirs of the said Poultney or Monfrett had since appeared to claim the said land, by means whereof, or some other the causes before set forth, the petitioner conceived the same become escheat unto us as aforesaid, and inasmuch as the
454 petitioner had been * the first discoverer, prayed to be admitted to its purchase, and, &c. In pursuance whereof, it is certified into our land office, that the said tract is resurveyed, by which it appears that the whole now contains the quantity of eighty-five acres, whereof fourteen acres is vacant land added, for which said escheat and vacancy the said Charles Carroll has, according to our instructions to Edmund Jenings, Esq., our present Judge of our land office, bearing date at Annapolis, the 14th of June, 1733, paid and satisfied unto Daniel Dulany, Esquire, our present agent and receiver general, for our use, as well the sum of seven pounds sterling, being one-third part of the value set on the said escheat, as also the sum of six shillings sterling, for the rights to the vacancy added; but before our grant thereon to him did issue, he the said Charles Carroll did, on the 4th of June, 1734, for a valuable consideration, assign, sell, transfer and make over unto William Fell, of Baltimore, his heirs and assigns forever, all his right, title and interest, of, in and to the said land and the certificate thereof, who has supplicated us that our letters patent of confirmation may now issue unto him, which we have thought fit to condescend unto. And we

do, in consideration thereof and other the premises, hereby give, grant, and confirm unto him the said William Fell, all that the aforesaid tract or parcel of escheat land, with its vacancy added, now resurveyed, and still called Island Point, lying and being in Baltimore County: Beginning, &c.

The last will of William Fell, dated 12th January, 1746, devised as follows:

In some good degree of the fear of Almighty God, it seemeth good to me, William Fell, of Baltimore County, in the Province of Maryland, to make and declare this to be my last will and testament, relating to those things it hath pleased God to bless me with in this world, in manner and form, following: First. My will and desire is that all those debts, &c.

Item. I give and bequeath unto my son Edward Fell, three tracts of land, called Long Island Point, Cole Harbor and Trynkeltfield; also, all the south part of a tract of land called Mountenay's Neck, as shall be found lying on the south side * of the main road now lying through the said tract, &c.; also, I give and bequeath **455** unto my daughter Catharine the remaining north part of my tract of land already mentioned by name of Mountenay's Neck, lying on the north side of the main road aforesaid, and, &c.

Edward Fell to Thomas Sligh, 200 acres Mountenay's Neck. By indenture dated 17th August, 1758, conveyed all his, the said Edward Fell, his right, title, interest, property, claim and demand, as well in equity as in law, of, in and to all that tract or parcel of land and premises, lying and being in the county aforesaid, on the north-west branch of Patapsco, called Mountenay's Neck, containing two hundred acres, more or less. To have and to hold the said bargained tract or parcel of land and premises, with the appurtenances, and every part and parcel thereof, unto him the said Thomas Sligh, his heirs and assigns forever, and to his and their only proper use and behoof.

Samuel Wheeler and wife to David Jones. *Know all men by these presents*, that I, Samuel Wheeler, and Ann Wheeler, my wife, for divers good causes and considerations hereunto moving, have made, constituted and appointed, and do, by these presents, ordain, constitute and appoint my well-beloved friend, Thomas Lightfoot, for me and in my stead, to transfer, convey and make over unto David Jones, of Baltimore County, all that parcel of land called Mountenay's Neck, being two hundred acres of land, lying upon the north-west branch of Patapsco River, and we, the said Samuel and Ann, do hereby ratify and confirm and allow what our said attorney shall act or do in the premises, to be of as much strength and power in law as we ourselves were then and there present. Witness our hands and seals this ——— 1686.

SAMUEL WHEELER, [Seal.]

ANN WHEELER, [Seal.]

Signed, sealed and delivered in the presence of us, Edward Batson, William Baroll.

June 1st, 1686. In open Court in Baltimore County, Mr. Thomas Lightfoot came and acknowledged himself to be the * attorney
456 of Samuel Wheeler and his wife, for the making over a parcel of land unto the within mentioned David Jones, called Mountenay's Neck.

Memorandum. That the blank in the above power of attorney was left in the original record.

* Certified—per, ROGER MATTHEWS, Transcriber.

Transcribed from liber C, No. 1, folio 189.

This indenture, made the twenty-second of March, in the year of our Lord, God everlasting, one thousand six hundred and eighty-five, between Samuel Wheeler and Ann Wheeler, of Cecil County, his wife, in the Province of Maryland, gentleman, of the one part, and David Jones, of Baltimore County, of the aforesaid Province, gentleman, of the other part, witnesseth, that the said Samuel Wheeler and Ann Wheeler, his wife, for a valuable consideration already in hand received, have bargained, sold and made over, and do, by these presents, absolutely bargain, &c., from me, my heirs and assigns, unto the aforesaid David Jones, his heirs and assigns, all that tract or parcel of land called Mountenay's Neck, lying in Baltimore County and upon the north side of Patapsco River, and upon the north side of the north-west branch of the said river: Beginning at a marked red oak by a little branch, and running up to the north-west branch west-north-west one hundred perches, over a cove into a marked white oak standing on a point, then running north-north-east into the woods three hundred and twenty perches, then running east-south-east one hundred perches, then running south-south-west to the first tree, for two hundred acres of land, more or less. Together with all the estate, right, title, interest, claim and demand whatsoever, of him the said Samuel Wheeler or Ann Wheeler, his wife, their heirs, executors or administrators. To have and to hold, &c.

This conveyance of land, with the appurtenances thereof, was acknowledged and made over by Thomas Lightfoot, the attorney of Samuel Wheeler and Ann Wheeler, unto David Jones, and was then
457 and there acknowledged to be their act * and deed, before us, this 1st day of June, 1686, in open Court in Baltimore County.

Signed, per order,

THOMAS HEDGE, Cl'k Balt. Co.

Transcribed from liber C, No. 1, folio 290, 300, 301 and 302.

John Oulton's Patent, 161 Acres—Bold Venture. Charles, &c. To all, &c.: Know ye, that for and in consideration that John Oulton, of Baltimore County, in our said Province of Maryland, hath due unto him one hundred sixty-one acres of land within our said Province being due unto him by virtue of a warrant for five hundred acres, granted him the 26th November, 1695, as appears in our land office,

and upon such conditions and terms as are expressed in our conditions of plantations of our said Province, bearing date the 5th day of April, 1684, and remaining upon record in our said Province of Maryland. We do hereby grant unto him the said John Oulton, his heirs and assigns, all that tract or parcel of land called Bold Venture, lying on the north side of Patapsco River, and on the north side of Whetstone branch: Beginning at a bounded white oak, standing by the branch side, it being a bound tree of Pountny's Point, and running thence north-north-east fifty-eight perches to a bounded red oak of Mountenay's, then with Mountenay's land west-north-west one hundred perches to a bounded white oak of Mountenay's, then with Mountenay's long line north-north-east three hundred twenty perches, then west-north-west fifty-four perches, then south-south-west three hundred twenty perches to a bounded ash, then south-south-west two degrees southerly twenty-four perches to the river side, then down the river south-south-east two degrees easterly eleven perches, then south-south-west two degrees southerly twenty-four perches, then with a direct line to the first tree, containing, and now laid out for one hundred sixty-one acres of land, more or less, according to the certificate of survey thereof, taken and returned into our land office, bearing date the 23d December, 1695, and there remaining, together, &c. To have and to hold the same unto the said John Oulton, his heirs and assigns forever, &c.

* April 14th, 1737. Whereas William Fell, of Baltimore County, by his petition to his lordship's agent for manage- 458
ment of land affairs within this Province, has set forth that there is escheat unto his lordship a certain tract or parcel of land called Mountenay's Neck, lying and being in the county aforesaid, originally, on the 30th day of June, 1663, granted unto a certain Alexander Mountenay, for the quantity of 200 acres, under old rent; that afterwards, on the 22d March, 1685, a certain Samuel Wheeler and Ann, his wife, by their indenture of bargain and sale, conveyed the said land to a certain David Jones, who died thereof possessed, intestate, and without heirs, by which means, or for want of heirs of the said Alexander Mountenay, or regular conveyances from him as first taker up, the same is become escheat to his lordship as aforesaid; and the petitioner being the first discoverer thereof, humbly prayed to be admitted to its purchase, be the same escheat by the means aforesaid, or by any other ways and means whatsoever, and a special warrant to re-survey the same, with liberty of adding any vacant land that can be found thereto contiguous, &c.; that upon return of a certificate of such re-survey, he paying his lordship's agent such reasonable price as shall be agreed upon for the purchase of said escheat, and making good rights to the vacancy added, might have his lordship's letters patent of confirmation issue unto him thereon, which is granted him, provided he complies with all requisites, and finally sues out such grant within two years from the date

hereof. Lay out, therefore, and carefully resurvey for and in the name of him the said William Fell, the aforesaid tract or parcel of escheat land called Mountenay's Neck, according to its ancient metes and bounds, and by your outlines adding any vacant land you can find thereto contiguous, whether cultivated or otherwise, not running your lines, &c. In testimony, &c.

LAND OFFICE, *Annapolis*, 24th Oct. 1842.

Dear Sir,—Yours of the 22d inst. I have just received. Herewith I hand you a copy of the warrant of escheat obtained by William Fell in 1737, upon Mountenay's Neck. There is no petition to be found, either on record or on file, in this office. * The warrant
459 sets forth that William Fell, by his petition to his lordship's agent, &c.; but this appears to be the form of all the warrants issued under the Proprietary government without any petition being filed. If a petition had been filed, it would of course have been recorded with the warrant, and made a part of the record. Applications for warrants, I presume, were frequently made under the Proprietary government in person and not in writing, as is also the case under the State government. I have never been able to find any petition for a warrant, either on file or of record, in this office, and have therefore concluded that none were ever filed. Under the State government, when application is made for a warrant of escheat, we insert in the warrant such description of the land as is furnished us by the party applying for the warrant, the want of due precision being at his risk, I can send you nothing more than a copy of the warrant. (In haste.) Yours, very respectfully,

William F. Giles, Esq.

G. G. BREWER.

William Poultney, Patent 100 Acres—Long Island Point. Cæcilus, &c. Know ye, that we, for and in consideration that William Poultney, of the County of Baltimore, in our said Province of Maryland, planter, hath due unto him one hundred acres of land within our said Province, by assignment from Robert Wilson, the assignee of Capt. Thomas Beason, due the said Beason for transporting John Greene and Sarah Sandstead into the said Province, to inhabit, as appears upon record. And upon such conditions and terms as are expressed in our conditions of plantation, &c., do hereby grant unto him the said William Poultney all that parcel of land called Long Island Point, lying in Baltimore County, on the north side of Patapsco River, and on the northwest branch of the river: Beginning at a bounded locust standing at the head of a round bay, and running down the said bay south-southwest eighty perches to a bounded Spanish oak at the mouth of said bay, and from the said oak up the said branch northwest thirty-six perches, then west-southwest one hundred perches, then west-northwest seventy-two perches to the bottom of Long Island Point, then northeast sixteen perches, then
460 east and by south sixty * perches, then north and by east eighty perches to a bounded red oak of a parcel of land laid

out for Alexander Mountenay, then north-northeast by Mountenay's land seventy-six perches, and then to the first bounded tree, containing, and now laid out for one hundred acres of land, more or less, together, &c., in fee, dated 10th July, 1671.

Mr. Edward Fell's Certificate—Fell's Prospect, 343 Acres—Patented the 20th May, 1761. Rent per annum £13 9s. sterling, charged to the Rent Roll.

BALTIMORE COUNTY, *Sct*: By virtue of a special warrant, granted out of his lordship's Land Office, bearing date by renewal, October 23rd, Anno Domini 1760, to lay out and resurvey for Edward Fell, of Baltimore County, the following tracts or parcels of land, viz: Long Island Point, lying and being in Baltimore County, originally, on the 23rd of October, 1670, granted unto a certain William Poultney, for one hundred acres, under new rent; Copius Harbor, originally, on the 10th day of August, Anno Domini, 1684, granted unto a certain John Copius, for one hundred acres, under new rent; Carter's Delight, originally, on the 10th day of December, Anno Domini 1717, granted John Carter, for one hundred acres, under new rent; and Trinket Field, originally, on the 18th day of August, Anno Domini 1736, granted unto William Fell, father of the aforesaid Edward Fell, for eighteen acres, under new rent, to be laid out according to their ancient metes and bounds. Nevertheless, correcting and amending any errors in the original surveys, and by my outlines adding any vacant lands I could find thereto contiguous, whether cultivated or otherwise, &c. I, William Smith, deputy surveyor of Baltimore County, have carefully resurveyed for and in the name of him the aforesaid Edward Fell, the aforesaid tracts or parcels of lands, according to their ancient metes and bounds: Beginning, for Long Island Point, at a bounded white oak standing at the head of a round bay on the northwest branch of Patapsco River, and at or near the spot where stood a bounded locust, the original bounded tree, and running thence down the said bay, south-southwest eighty perches, thence northwest thirty-six * perches, west-southwest one hundred perches, west-northwest seventy-two perches, northeast sixteen perches, east by south sixty perches, north by east eighty perches, to a bounded red oak, of a tract of land called Mountenay's Neck; then north-northeast by Mountenay's seventy-six perches, then with a straight line to the beginning, containing, and laid out for one hundred acres, more or less; and for the resurvey made by William Fell on the aforesaid tract or parcel of land, bearing date the 5th day of June, 1734, as by patent: Beginning at the aforesaid bounded white oak standing at the head of a round bay on the northwest branch of Patapsco River, and running thence south four degrees west sixty-six perches, south sixty-three degrees west fourteen perches, north forty degrees west thirty perches, north eighty-seven degrees west forty-two perches, south fifty degrees west

fifty-six perches, south seventy-three degrees west twenty-four perches, north fifty-five degrees west fifty-four perches, north forty-five degrees east sixteen perches, south eighty degrees east sixty-four perches, north three degrees east eighty perches, north-northeast seventy-six perches, thence with a straight line to the beginning, containing, and now laid out for eighty-five acres. Copius Harbor: Beginning at a bounded red oak, being a bounded tree of Kemp's Addition, and running from thence northwest thirteen perches to a bounded water oak standing near the said branch, then running west and by south thirty-two perches to a bounded locust of Long Island Point, then running north fifty degrees forty-five minutes west one hundred and thirty perches to a bounded red oak, thence northeast one hundred and fifty-six perches, then southeast by south ninety-six perches, bounding on Kemp's Addition, thence with a straight line to the beginning, containing, and laid out for one hundred acres. Carter's Delight: Beginning at a bounded red oak standing in or near the given line of Mountenay's Neck, and running thence north sixty perches, north seventy eight degrees east one hundred and thirty perches, south eighty-seven degrees east fifty perches, south fifty-nine degrees east sixty-eight perches, south forty-two perches, **462** north *sixty-four degrees west eighty-six perches, south eighteen degrees west twenty-four perches, south thirty degrees west twenty-two perches, south thirty-six degrees thirty minutes west twenty-six perches, thence with a straight line to the beginning, containing, and laid out for one hundred acres, more or less. Trinkett's Fields: Beginning at a red oak bounded with twenty-four notches, a bounded tree of Copius Harbor, and running thence north-northeast one hundred and twenty-three perches, southeast by south forty-seven perches, thence with a straight line to the beginning, containing, and laid out for eighteen acres, more or less, which said tracts or parcels of land contains in the whole three hundred and three acres; thirty-three acres, part thereof, is taken away by elder surveys and lost in navigable water, which I have excluded. I have also added to the residue of the said tracts seventy acres of vacant land, and three acres of escheat, as part of Long Island Point, not heretofore escheated, and liberty now given to escheat the same, and have reduced the whole into one entire tract, bounded as follows, viz: lying in Baltimore County: Beginning at a bounded white oak standing at the head of a round bay on the north side of the northwest branch of Patapsco River, being the same bounded white oak expressed in the former grant to be the beginning of Long Island Point, and running thence bounding on the said round bay the six following courses, viz: south twelve degrees west ten perches, south twenty-three degrees east six perches, south eleven degrees west twenty-six perches, south ten degrees east twelve and a half perches, south fifteen degrees west fourteen and a half perches, south fifty-three degrees west six and a half perches, to the

bottom of the round bay; then running and bounding on and up the said river the nine following courses, viz: north seventy-six degrees west seven perches, north thirty-six degrees west twenty-two perches, north sixty-five degrees west sixteen perches, west twenty-six perches, south fifty-eight degrees west thirty-eight perches, south forty-six degrees west thirty perches, south eighty-eight degrees west twenty-six perches, north sixty-one degrees west thirty-four perches, north *thirty-six degrees west nine perches, to the bottom of Long Island Point, as expressed in the original **463** grant; then running and bounding with the river the ten following courses, viz: north thirty-eight degrees east eight perches, north fifty-eight degrees east seven perches, south sixty-eight degrees east twenty perches, south eighty-six degrees east twenty-eight perches, south seventy-seven degrees east ten perches, north twenty-five degrees east eighteen perches, north eight degrees east ten and a half perches, north nineteen degrees west fourteen and a half perches, north eight degrees east twenty-eight perches, north thirty-three degrees west sixteen and a half perches to the first line of Mountenay's Neck, and running with the said line reversely south sixty-seven degrees and thirty minutes east eight perches to a post, the beginning of Mountenay's Neck, then running and bounding reversely with his given line, north seventeen degrees east two hundred and thirty-eight perches to the beginning tree of Carter's Delight, still running and bounding on Mountenay's Neck, north seventeen degrees east sixty-seven perches, until it intersects the second line of Carter's Delight, then running and bounding with the said line north seventy-eight degrees east one hundred and eleven perches to the end of the said line, still bounding on the said land south eighty-seven degrees east fifty perches, south fifty-nine degrees east sixty-eight perches, south forty-two perches, north sixty-four degrees west eighty-six perches, south eighteen degrees west twenty-seven perches, until it intersects the sixth line of Kemp's Addition, then bounding with the said land reversely west-northwest thirty-six perches to the end of the fifth line of the said land; then running and bounding with the land aforesaid, the five following courses, viz: south by west twenty-four perches, southwest by south eighty perches, southeast by south eighty perches, south by west one hundred and twenty perches, southeast thirty-two perches to the beginning tree of Kemp's Addition and the second tree of Parker's Haven; then bounding on Parker's Haven reversely the two following courses, viz: east-southeast seventy perches, north by east two hundred and sixty-five *perches until it intersects the seventh line of Kemp's Addition, then running south thirty-seven **464** degrees east thirty perches to a creek called Harris' Creek; then running down and bounding on the said creek the fifteen following courses, viz: south eleven degrees west fifty-one perches, south fifty-five degrees west sixteen perches, south twelve degrees west sixty-

one perches, south fifty-four degrees east six perches, south nineteen degrees west four perches, south sixty-nine degrees west six perches, south ten perches, south thirty-six degrees east fourteen perches, south thirty-two degrees west eighteen perches, south sixty-three degrees west four perches, south fifteen degrees west sixteen perches, south four degrees west thirty-eight perches, south twenty-two degrees west twelve perches, south thirty-six degrees west fourteen perches, south sixty-four degrees west nine perches, to the mouth of the said creek; then running and bounding with the river the five following courses, viz: north eighty-two degrees west forty-six perches, north sixty degrees west sixteen perches, north thirty-three degrees west seventeen perches, north fifty degrees west twenty-four perches, north twenty-three degrees west sixteen perches, then with a straight line to the beginning, containing, and laid out for three hundred and forty-three acres of land, more or less, to be held of the manor of Baltimore, by the name of Fell's Prospect. Resurveyed March the 10th, 1761.

WM. SMITH, D. S., B. County.

May 12th, 1761. The certificate and plot disagree in the direction of the fifty-fifth course, disallowed.

U. SCOTT, Exam'r.

May 20th, 1761. Examined and passed.

U. SCOTT, Exam'r.

On the back of which certificate was the following receipt, viz:

I have received the sum of three pounds thirteen shillings for the within vacancy, and eleven shillings and six pence for the three acres escheat. Patent may therefore issue with his Excellency's approbation.

EDW'D LLOYD.

20th May, 1761. Approved.

H. SHARPE.

465 * The defendants then offered in evidence leases for terms of years from Ann Fell to Abraham Inloes, dated 17th Feb. 1768; from same to Geo. Fletcher, dated 3rd Nov. 1768; to same 15th April, 1768; to William Scarff, dated 27th May, 1768; to William Rowles, dated 16th September, 1769, for the lots 5, 6, 7, 8, 9 on Bond street.

And also gave in evidence that each of said papers was truly located by them on the plats in this case; and also proved that said Inloes, and the other defendants, and those under whom they claimed, have been in possession of said lots on Bond street, claiming title to the same, upwards of thirty years before the institution of this suit. And then proved that William Inloes became entitled, as heir of Abraham Inloes, to the ground marked on the plat by the No. 5.

And the defendants then further offered in evidence the following ordinances of the Mayor and City Council of Baltimore, to wit: Of 4th May, 1801; 24th March, 1813; 25th March, 1814; 28th May, 1814; 11th March, 1823; 13th April, 1826.

And the following Acts of Assembly, to wit: Of 1783, ch. 24, sec. 9; 1796, ch. 68; 1745, ch. 9.

And then the defendants read in evidence the following receipts of payment of taxes to the City of Baltimore, and for filling up for the

ground in dispute in this case—(all which are omitted as not material to this report.)

City Commissioners' Office, Baltimore, 27th June, 1838. I hereby certify that the following named persons, viz. William Inloes, J. S. Inloes, Godfrey Meyer, James Hooper, A. B. Harrison, George Chapman, and J. L. Chapman, have paid the amount charged them respectively for filling up a square of ground situated between Caroline and Canal streets, and Aliceanna and Lancaster streets.

By order,

R. B. VARDEN, Cl'k C. C.

The defendants then further to prove the issue on their part, offered evidence, by — Graves, that he has resided forty-seven or forty-eight years on Fell's Point, and has that long known the property now in dispute; that William Inloes' fence was * put down in 1807 or 1808, and continued, he thinks, nine or ten **466** years; that it began at about the middle of Caroline street, and went westerly, he would not say as far as Spring street; that a great deal of wash at that time come down Caroline street; that the wash went against the fence of Inloes aforesaid, and was turned by it westerly of the fence; that the wash southerly of Fleet street spread, the ground being flat; that the fence was made for filling up, and that was known in the neighborhood, and that it had the effect of filling up by catching the sediment as it came down; that persons looking could see the fence from Wilkes street; that he cannot say it was standing when the city began filling up; that the fence was of inch board, nailed to the log; that persons owning the ground on Bond street claimed water rights, and that therefore Inloes ran out; that he knew Joshua Inloes' wharf; that Joshua Inloes married his sister, and that he was apprentice to Joshua Inloes; that the wharf was up in 1795, and extended fifteen or twenty feet westerly of Strawberry alley; that Joshua Inloes had a fence from his wharf; that William Inloes' fence began about the middle of Caroline street; that he saw Inloes six or seven times repair it in that number of years; that it continued eight or nine years; that he thinks he saw it since 1814, but will not speak positively; that the wash which went down Caroline street, was turned eastwardly into Ann street about the year 1808, but that still some wash came down until a few years past; that the fence caught some of the wash; that before the fence was put there, there was no ground at the place, and afterwards there was, both on the north and south side of the fence; that the muddy water would go through the fence; that at low tides the fence was bare; that when the fence was put up it was about three feet above the ground; that when witness last saw it, it was eighteen inches above the ground at low tides; that Chapman, in 1826 or 1827, built the warehouse marked on the plat.

And the defendants further offered evidence, by Peter Foy, that he was a member of the Board of Health from the year 1818 to the year 1825; that the filling up of the cove was not * completed **467** till last year; that in 1814 or 1815 a part of the filling on Lan-

caster street was completed; that the square in dispute has been enclosed six or seven years; that Chapman's glass house was built in 1826 or 1827; that eighteen months or two years afterwards the water was expelled from the square by the discharge from the mud machines, and then water was let in and run over the sediment so as to spread it, which was done by the city authorities; that witness went with the City Commissioners, under the ordinance of 1823, to owners of ground on Bond street, for making contracts under the ordinances, but that he does not remember to whom he went, and all asked signed but Inloes, but he said it was not a nuisance, for his lot did not want it; that Joshua Inloes' wharf stood about 1794, 1795, or 1796; that it ran out fifty or sixty feet westerly of Strawberry alley; that he saw William Inloes put a fence, or some contrivance, about 1808 or 1809, in the rear of his (Inloes') lot, to catch the sediment, or that the fence was made by driving down stakes of one or one and a quarter inch stuff into logs or scantling, or something; that the stakes were there a number of years; saw some of them in 1823; that the tops of them contributed to impede the course of the sediment north and south of Aliceanna street; the ground was bare at low tides; common tides covered it, and ten or twelve years ago the water flowed over the ground above Aliceanna street; the ground is considerably lower than the beds of the streets; Inloes has been claiming title to the ground as it made, and claimed as owner of the lot under his father, and to be entitled to follow the water; the wash down Caroline street was over flat ground after leaving Fleet street, and then spread; that he does not know whether the fence was kept up in 1813 or 1814: that he passed often where he might have seen it if he had looked; that any person could have seen it from Wilkes street; does not recollect taking notice of it.

The defendants further offered evidence, by Walter Frazier, that he began to work on the mud machine in 1818, and continued till 1841; that in 1818 the mud was depositing on Lancaster street, and
468 that up Harford street for a distance, * there was firm land; that at that time the tide went up back of William Inloes' ground, and that a gap for boats was left in Spring street, at Lancaster street; that he saw Inloes' fence in 1818 and in 1825 or 1826, the last year of the filling up, and that in 1825 there was firm land along it on Inloes' lot. It was made of stakes driven down, and could have been seen from Wilkes street by any person looking at it; has seen Inloes repairing the fence somewhere about Caroline street; that William Inloes always claimed to go to Harford Run, and said his father's deed would carry him to Jones' Falls; that Inloes fence stopped the wash. There was a fence as far as Eden street; witness saw it when he was filling up Eden street; that in 1819 there was firm land at the corner of Canal and Lancaster streets; that witness used to cut grass there; that the squares above Aliceanna street, between Eden and Caroline streets, were covered with

water after the lower squares were filled up. Cross-examined, he says, that the square in dispute was enclosed eight or ten years ago, and that the fence was put around it after the filling up was finished; that Inloes' fence began on the east side of Caroline street, and ran west of it; that the first time he saw it was in 1817 or 1818; that it was made of stakes driven down and boards nailed to it; that in 1819 there was no attention paid to it, as the ground was filling up; that the stakes, when he first saw the fence, were broken off, and were then some two or three feet apart; that in 1818 the stakes were three feet above the mud, and that when the lot was filled up it was filled three or four feet above the tops of the stakes.

And the defendants further offered evidence, by Abraham Parks, that he remembers that about thirty years ago Inloes' fence was first done; that witness was in the business of hauling dirt and gravel, and asked Inloes' leave to throw out dirt and stones on his lot; that the lot went out then, which was about twenty years ago, pretty far; does not know whether it was high ground beyond Caroline street; that it was dry a good smart place beyond Caroline street. That he speaks of the street (Aliceanna street) west of Caroline street as dry about * one hundred feet out; he got permission of Inloes before the war to cast dirt and stone along his fence, and did **469** so; he had the filling up of the street (Aliceanna,) and hauled a good many loads to it after he got Inloes' permission; that the fence was up then; that Inloes' fence was repaired from time to time.

The defendants further offered evidence, by Alexander J. Bouldin, surveyor of Baltimore County, that he executed a special warrant as for vacancy in the year 1836, for a piece of ground, including the ground now in question, issued to James Tracy and the heirs of John Hammond, and returned the survey to the land office.

And the plaintiff thereupon, further to prove the issue on their part, offered evidence by said Bouldin, that the ground now in question was not yet enclosed on the — August, 1839, and that William Inloes claimed the ground now claimed by him, on the ground, as he stated, that he had a right to follow the water and to go wherever the water went.

And the plaintiff further offered testimony, by — Abbott, that one Spencer made a fence, with stakes driven down, beyond Spring street, and that was in his opinion the fence mentioned in Frazier's testimony, as extending to Eden street from Spring Street.

And the plaintiff further offered to prove by said Bouldin, that at all times while the ground was making in the cove, it was the prevalent opinion in that neighborhood that the title to the ground, making by nature or artificially, was in the State or the city, and not in any owners of any of the banks of the cove. But to the admission of this testimony the defendants objected, and the Court, [ARCHER, C. J.,] refused to admit the same to be given. The plaintiff excepted.

2nd Exception.—And the plaintiff and defendants having respectively offered the testimony stated in the foregoing bill of exceptions, which is made part of this bill. The plaintiff thereupon, further to prove the issue on her part, offered in evidence the following certificate from the debt book of the Province of Maryland. (See *ante*, pages 446, 447.)

470 * And the defendants, further to prove the issue on their part, offered to read in evidence the following certificate from the rent roll of the Province :

<i>Acres. Rent.</i>	<i>Acres. Rent.</i>		
200 0 8 0	200 0 8 0	Thomas Sligh from Thomas Sheredine, 26th June,	1756
		Escheat.	
	10 0 0 5	Peter Lettage from Thos. Sligh, 20th May,	1757
		Thos. Sligh from Bryan Philpott, 9th June,	1758
	200 0 8 0	Thos. Sligh from Edward Fell, 14th August,	1758
	14½ 0 0 7	Thomas Hammond from Thos. Sligh, 31st January,	1759
		Thos. Sligh from Charles Carroll, Esq. 31st May,	1759
100 0 4 0	2 0 0 1	John Brustal from Thos. Sligh, 28th June,	1759
100 0 4 0	4 0 0 2	John Hammond Dorsey from Thos. Sligh, 6th November,	1759
	4 0 0 2	William Young from Thos. Sligh, 8th November,	1759
	8½ 0 0 4½	Alexander Stewart from Thos. Sligh, 28th November,	1759
	2 0 0 1	Daniel Bernet from Thomas Sligh, 28th February,	1761
		Peter Woolrick from Thomas Sligh, 21st May,	1762
	6 0 0 8	Jacob Myers from Thomas Sligh, May 3rd,	1766
	9½ 0 0 5	John Deaver from Thomas Sligh, July 17th,	1766
	9 0 0 4½	John Deaver from Thomas Sligh, March 28th,	1767
	6 0 0	Jacob Myers from Thomas Sligh, 2nd July,	1768
	1 0 0 1	James Sterret from John Askers, 26th September,	1771
	1 0 0 1	James Sterret from John Devour, 8th May,	1773
		J. Cornthwaite & G. Hopkins from J. Devour, 21st June,	1778

Acres. Rent.

200 0 8 0 Mountenay's Neck.

Escheat.

Land originally so called lying on the north side of the N. W. branch of Patuxco River. Resurveyed 27th April, 1737, for William Fell.

100 0 4 0 Thomas Sligh,

100 0 4 0 Thomas Sheredine,

Possessors.

* In testimony that the foregoing is a true copy from the old rent roll for Baltimore County, No. 1, folio 471 220, one of the records belonging to and remaining in [Seal place.] the Western Shore land office of Maryland, I have hereunto set my hand, and affixed my official seal, this 8th day of November, 1842.

GEO. G. BREWER, Reg. Land Office, W. S. Md.

The plaintiff objected to the admission of said last testimony, and the Court, [ARCHER, C. J.,] allowed the said paper to be read in evidence. The plaintiff excepted.

3rd Exception—And the plaintiff and defendants, having offered the testimony stated in the foregoing bills of exception, which is made a part of this bill, the plaintiff, further to prove the issue on her part, offered in evidence the patent of Rogers' Inspection:

Mr. William Rogers—patent fifty-three acres—Rogers' Inspection. Frederick, &c. Know ye, that whereas, William Rogers, by his humble petition to our agent, for management of land affairs within this Province, did set forth, that a certain John Boreing had, on the 20th day of April, seventeen hundred and forty-two, surveyed and laid out for him a tract or parcel of land called Boreing's Convenience, lying and being in the county aforesaid, containing seventy-five acres, by virtue of an assignment for that quantity from Thomas Sheredine, being part of a warrant for four hundred acres, granted said Sheredine the twenty-fourth day of October, seventeen hundred and forty-one, as per the certificate thereof, taken and returned in the land office might appear; the petitioner further showed that the said certificate had laid over since in the office postponed, and no patent had ever yet issued thereon, and as the two years for suing out such grant was expired, the petitioner was desired, that by sundry of our proclamations published, the certificate aforesaid was become null and void, and the land and premises therein mentioned subjected to the benefit of the first discoverer, and inasmuch as the petitioner was the first discoverer; and desired to take up and pay for the same, humbly prayed a special warrant to resurvey the aforesaid tract, * with the liberty of adding any contiguous vacancy, 472 and return of a certificate of such resurvey, he paying the caution money, and complying with all other requisites usual in such cases, might have our grant issue unto him thereon, which was granted him; and accordingly a warrant on the 27th day of April, seventeen hundred and fifty-nine, unto him for that purpose did issue; but the said warrant not yet being executed, it was on the eighteenth day of June, seventeen hundred and fifty-nine, renewed and continued in force for six months longer from that date, with liberty therein given to include a certain tract of escheat land called Bold Venture, contiguous to the former tract, originally granted unto a certain John Oulton, for one hundred and sixty-one acres, died seized thereof intestate, and without heirs, by which means the same became

escheat to us, humbly prayed to be admitted to the purchase of the said escheat, being it escheat by the means aforesaid, for any or other ways or means whatsoever. In pursuance whereof it is certified in our land office that the aforesaid tracts or parcels of land are surveyed, by which it appears that that tract called Boreing's Venture, clear of elder surveys, contains no more than the quantity of twenty-seven acres, and that that parcel of escheat land called Bold Venture, also clear of elder survey, contains no more than the quantity of twenty-one acres; and that there is the quantity of five acres of vacant land added, for which he has paid, &c. We do therefore hereby grant and confirm unto him the said William Rogers, all them the aforesaid two tracts or parcels of land now resurveyed and called "Rogers' Inspection," beginning for the first mentioned part in the east line of a tract of land called "Todd's Range," and where the said east line of Todd's Range intersects the west side of "Jones' Falls," and running thence, bounding on and with the said east line of Todd's Range, east one hundred and ninety-eight perches, until it intersects the south-south-west, three hundred and twenty perches, line of the original escheat tract of land called Bold Venture, then bounding on and with that line south-south-west, twenty-nine perches, until it intersects the east line* of a tract of land called Cole's

473 Harbor, then bounding on and with that line of Cole's Harbor, east sixty perches, until it intersects the north-north-east, three hundred and twenty perches, line of a tract of land called "Mountenay's Neck," then bounding on that line to the end thereof, north-north-east forty-four perches, then west-north-west fifty-four perches, unto the end of the west-north-west, fifty-four perches, line of the original escheat tract, called "Bold Venture," then then south-south-west twenty perches, until it intersects the east, one hundred and eighty-one perches, line of a tract of land called Garrow Barrow, then bounding on that line reversed, of the same west one hundred and twenty-two perches unto the end of the south, six degrees west, thirty-seven perches, line of said land, then bounding on that line, reverse of the same, north six degrees east, twenty-nine perches and three-quarters of a perch, until it intersects the east line of a tract of land called "Hanson's Wood Lot," then bounding on that line, reverse of the same, west twenty-one perches and half a perch, until it intersects the south by west line of a tract of land called Salisbury Plains, then bounding on and with that line to the end thereof, south by west thirty-nine perches, then bounding and with the given line of Saulsbury Plains, north forty-one degrees and thirty minutes west, ninety-one perches and a half of a perch, until it intersects the given line of a tract of land called Lann's Lot, and then with a straight line to the place of beginning; containing and laid out for fifty acres and the fourth part of an acre, more or less. Beginning for the other part at a bounded white oak standing near the side of the north-west branch of Patapsco, it being

the second bounded tree of a tract of land called Mountenay's Neck, and running thence, bounding on the said land, east-south-east seventy-one perches, unto a creek of the said north-west branch, then bounding down with the said creek, south twenty degrees, west seven perches unto the mouth of said creek, then bounding upward on said north-west branch, the four following courses, viz: north fifty-eight degrees west, thirty-five perches, south eighty degrees west, sixteen perches, north seventy-four degrees west, ten perches, north * thirty-three degrees west, twenty perches, and then with a straight line to the beginning; containing. &c.: to **474** have and to hold the same, unto him the said William Rogers, his heirs and assigns forever, in the year, viz: the feast of the Annunciation of the Blessed Virgin Mary and St. Michael, the Arch Angel, by even, &c.

And thereupon, the plaintiff and defendants, respectively, prayed the Court in their respective parts, as follows:

Plaintiff's prayers from No. 1 to 16.

1st. If the jury shall find from the evidence that a patent was granted by the State of Maryland to Alexander Mountenay for Mountenay's Neck, on the 30th June, 1663, and a deed from Samuel Wheeler and wife to Daniel Jones, of the 22nd March, 1685, and the deed from Blunt to Todd, of the 4th October, 1689, and the deed from Todd to Hurst, of the 3rd of March, 1701, and the deed from Todd to Charles Carroll, of the 16th June, 1701, and the deed of mortgage from John Hurst to Richard Colegate, on the 13th October, 1702, the deed from said Hurst to Thomas Sheridine and Thomas Sligh, of the 19th March, 1749, and the will of Richard Colegate of the 8th day of August, 1721, in favor of his two sons, John and Thomas Colegate, and a deed from the said John and Thomas Colegate to Thomas Sheridine and Thomas Sligh, of the 15th November, 1750, a deed from Thomas Sheridine to Thomas Sligh, of the 26th June, 1756, a deed from Charles Carroll to Thomas Sligh, of the 31st May, 1759, the deed from Thomas Sligh to Thomas Hammond; and that said Thomas Hammond died before the Revolution, leaving William Hammond, his eldest son and heir-at-law, and that he inherited the land of his father Thomas, as such heir; and if the jury find the two deeds from the said William Hammond to John Cornthwaite, of the 20th September, 1775, and of the 2nd of April, 1779, and the two deeds from John Cornthwaite to John Hammond, of the 24th September, 1779, and of the 7th June, 1780, and the deed from John Hammond to John Anderson, of the 4th March, 1795. And if the jury believe that John Hammond intermarried with the plaintiff in this case soon after said last mentioned deed, and * that she was the sister of John Anderson. And if the jury **475** believe that said John Anderson departed this life about the year 1805, without ever having been married, and that said John Hammond also died soon after him, and that the plaintiff in this cause

afterwards intermarried with a certain R. Casey, who also departed this life before the institution of this suit. And if the jury further find from the evidence that said James Todd was in possession of Mountenay's Neck as early as the year 1700, and that those claiming under said Todd have continued in possession of the same, or parts thereof, according to their deeds, or as they became entitled thereto by will or descent, down to the present time, and also the record of ejectment of 1703, that John Hammond was in actual possession of that part of Mountenay's Neck, embraced in the deeds to him from Cornthwaite, during his life, and filled up on the water front of his lot, and in this way and by the wash from the upper ground through Caroline street, other land was made fast land, and added to his, and if he leased the same, or a part thereof, to McDowal, as stated in the evidence, and collected the rent from him; and that if, since the death of the said Hammond, those who claim under him have been in possession of the said property, and collected the rents thereof, or of such portions as have been leased, then if the jury believe the preceding facts they are bound to presume a deed from said Alexander Mountenay, or those claiming under him, to said Samuel Wheeler and wife, and from said David Jones to said Robert Blunt, or his ancestor, for the tract of land called Mountenay's Neck.

2nd. And if the jury believe, in addition to the facts set forth in the above or first prayer of the plaintiff, that the square of ground between the City Dock and Aliceana street, and Caroline and Spring streets, was filled up and made fast land by the authorities of the City of Baltimore, under the ordinance of 1823, and the other ordinances given in evidence, and was completed about the year 1836, and the defendants were in possession thereof at the institution of this suit, then the plaintiff is entitled to recover.

476 * 3rd. If the jury believe the facts set forth in the plaintiff's first and second prayers, and also, that plaintiff, and those under whom she claims, have been in possession of the part of said property, by having a house erected upon it, and by the actual enclosure of a board fence, then the defendants cannot avail themselves of any title from presumption, except of such part as they can prove that they have also been possessed of by actual enclosure for twenty years next before the impetration of the writ in this cause.

4th. That the defendants in this case cannot avail themselves of the benefit of a presumption of a grant to them for the property in dispute, unless they show by strong proof a continuous and uninterrupted possession thereof for twenty years next before the institution of this suit.

5th. That there is no evidence in this case to prove such possession.

6th. That the defendants cannot be allowed to avail themselves of any possession so as to defeat the title of the plaintiff, further than such possession is located on the plats in this case.

7th. That the acts and possessions of any one of the said defendants cannot avail the other defendants by affording to them the benefit of a presumption of a grant.

8th. That before the jury can find a title in the defendants, or any one of them by presumption of a grant from the plaintiff, or those under who she claims, they must believe in their conscience and find as a fact, that such grant was actually made.

9th. And that such grant was made by the plaintiff to the defendants, by deed regularly executed and acknowledged.

10th. That if the jury believe the evidence in this case, they cannot presume a grant from the plaintiff, or those under whom she claims, to the defendants, or either, from any acts or possession of the defendants, given in evidence, between the year 1783 and 1823.

11th. That the title of the plaintiff cannot be affected by adding together the different possessions and acts of the * defendants, at long intervals, in point of time, so as to make out twenty **477** years, nor can the possession of the defendants on the east side of Caroline street be connected with possession on the west side thereof, so as to make out the twenty years; but possession from which the presumption may be created, must be confined to the property in dispute.

12th. That the Statute of Limitations of James does not apply to the circumstances of this case, as stated in the evidence.

13th. If the jury find the patents, deed and ordinances offered in evidence in this cause by the defendants, and that they were so offered by the defendants to show that they had the superior, better and more ancient right to extend, fill up, and improve in front of of their own lots, than the plaintiff, and those under whom she claims, have in front of her lot, then no possession which has been proved in this case on the part of the defendants, or any of them, can give rise to a presumption of a grant to the defendants from the plaintiff, as the claim of a better title on the part of the defendants than the plaintiff ever had, if the jury find such claim, is wholly inconsistent and at war with such presumption.

14th. That if the jury believe that Island Point was resurveyed and other land added to it by William Fell in 1761, and that the whole were included in one tract under the name of Fell's Prospect, and that a patent of the same was granted to said Fell at the above date, and if they believe from the fact that the defendants have offered in evidence the said patent in this cause, as part of their title that they cannot now claim under the patent of Island Point, as a subsisting independent patent, but they must claim, if at all, by the relation to it of the patent of Fell's Prospect.

15th. That, even if the jury should believe from the evidence that Thomas Sligh claimed under the escheat patent of Mountenay's Neck to Edward Fell in the year 1737, still the said Thomas Sligh, and those claiming under him, have a right to go back by relation

to the original patent of Mountenay's Neck in 1663, and to date their title from that period.

16th. The plaintiff further prayed the Court to instruct the jury, that if they shall believe the evidence offered in this case * by
478 the plaintiff and defendants, that they may and ought to presume a deed from A. Mountenay, or his heirs, to Wheeler and wife, and from Daniel Jones, or those claiming under him, to Robert Blunt, or his ancestor, for the tract of land called Mountenay's Neck.

Defendants' Prayers, No. 1 to 4.

1st. That if the jury find that the tract called Bold Venture was granted as given in evidence by the defendants, and that the same is truly located on the plats in the cause by defendants, that then the patent of Mountenay's Neck gives no title to the lessors of the plaintiff to the lot of ground for which the defendants have taken the defence on the plats.

2nd. That if the jury find the existence of the grants of Long Island Point and Island Point, offered in evidence by the defendants, and that the location of the first tract of those is as made by defendants, and the location of the latter is according to either of the locations of the same as made by the defendants; and if they also find, that in 1734, when the survey of said latter grant was made and the patent granted, the water of the Patapsco ran up to and adjoined the line of said tract, according to one of the locations thereof aforesaid, that is to say, the line from red K to red L, or run east of that line, that then the defendants, and those under whom they claim, were as between themselves and the lessors of the plaintiff, and those under whom they claim, the elder riparian owners of the water lots on Bond street, in front of which, the lots run in controversy, included within the defendants' defence on the plats in the cause, to the legal ownership of the plaintiff of the lots on Wilkes street; and if the jury find those facts, that then the plaintiff is not entitled to recover.

3rd. That if the jury find the existence of the grants of Long Island Point and Island Point, offered in evidence by defendants, and that the location of the first of these tracts is as made by defendants, and the location of the latter is according to either of the locations of the same as made by defendants; and if they also find, that in 1736, when the survey of said latter grant was made and the
479 patent granted, the water * of the Patapsco River ran up and along the line of said tract, according to either of the locations thereof aforesaid, that is to say, the line from red K to red L, or run east of that line; and if the jury shall also believe that Mountenay's Neck rightfully escheated, that then defendants, and those under whom they claim, were as between themselves and the lessors of the plaintiff, and those under whom they claim, the elder riparian owners of the water lots on Bond street, in front of which the lots now in controversy, included within the defendants' defence on the

plats in the cause to the ownership of the plaintiff of the lots on Wilkes street, and if the jury find these facts, then the plaintiff is not entitled to recover.

4th. If the jury find that the tracts of land aforesaid, Bold Venture, Long Island Point and Island Point and Fell's Prospect were granted, as offered in evidence by defendants, and that the locations thereof as made by defendants are correct; and if they also find that the defendants, and those under whom they claim, have, from the year 1795 to the present time, been claiming and being in possession of the lots on Bond street, numbered from 5 to 9, as those lots are located on the plats in the cause, and always also claimed the right to improve their said lots by extending them into the water, under the authority of the Act of Maryland of 1745, ch. 9, and to be entitled to the land which might be so made out of the water in front of said lots; and if the jury further find, that one of the owners of said lots, that is, lot No. 5, in the year 1795, extended the front of his said lot from D to L, claiming to have the right to do so as aforesaid, and took possession thereof, and he, and those claiming under him, ever since exclusively held and owned the same as the fee simple owners thereof; and if they further find, that afterwards, in the assertion of the same right, the defendant Inloes claiming to have the right to do so, and to be entitled to the land which might be made by him in front of the said lot owned by him, erected the fence from P to Q, in the rear of the said lot No. 5, for the avowed purpose, by means thereof to intercept all the wash or sediment which, from any cause, might come down against the *said fence, and to cause the same to settle there, and convert the water there **480** then into land, as a part and parcel of said lot No. 5 extended, and also throughout openly declared that he had and claimed the right, if the city would permit it, and would, as soon as they did permit it, carry and extend his said lot over and across Eden street and as far as Canal street; and if they also find, that when said fence was so as aforesaid made by Inloes, the City of Baltimore had passed its ordinance of the 1st May, 1801, given in evidence by defendants; and if they find, that from time to time the washings and sediments aforesaid settled in and along said fence from P to Q, so as to make portions of the same dry land as late as 1810, and that as soon as the same became land, the same was taken possession of by Inloes claiming title to the same, and using it absolutely as his own; and if they further find, that for the like purpose of making the whole of his said lot to extend to the limits of said fence, he caused dirt from time to time, from 1805 to 1818, to be hauled and deposited along the same, and in that way, with the aid of the washings deposited in the same place, to convert the same into land, and that as the same was so made, he took possession thereof, and used, and claimed title to the use of the same; and if they further find, that the city afterwards passed the ordinances of the 24th March, 1813, 25th March,

1814, 25th May, 1816, 11th March, 1823, and 13th April, 1826; and if they also find, that the city acted under said ordinances, and went on from time to time to make the improvements contemplated by the same in that part of the property on the plat which lies between Lancaster and Aliceana streets on the north and south, and Canal street on the west, and Bond street on the east, to and with the aid and at the expense, as far as the same was charged to individuals, of the defendants, and those under whom they claim, on account of the lots aforesaid on Bond street; and if they further find, that as soon as the said ground was made by all those conjoint means, and from time to time as the same was made, the defendants, or those under whom they claim, took adversary possession of each and every
481 part thereof, lying annexed to * and in front of their said several lots on Bond street, and that as streets were opened over and across to them, they paid the assessment upon said property, levied by the city authorities for the making of such streets, and they also paid all the other taxes which have been levied upon said property since the same was made, and always, during all of said period, claiming title to said property, and being in the adversary use and possession thereof; and if they further find that during the said period the said defendants, and those under whom they claim, always asserted their right to extend their said lots on Bond street east to Canal street, and that such claim of right and such possession of the property as was from time to time taken by them, and such means as were adopted by them to make such extensions, were all notorious and well known to the lessors of the plaintiff; and if they further find that plaintiff, or those under whom she claimed, never claimed or used her or their right to extend her said lot on Wilkes street further than Aliceana street and never gave any notice to the defendants or those under whom they claim, that when the particular property in dispute should by them, at their expense, be made, that she would claim title to the same, or in any manner disturb the right and interest of the defendants, or those under whom they claim in said property when the same should be made, and that they never have paid or offered to pay the taxes on the same; and if they further find that Chapman, one of the defendants, in the year 1826 or 1827, built the glass house at the corner of Caroline and Lancaster streets, and has, until the institution of this suit, held peaceable possession of the same, claiming title to the same; if they also find that Hammond and Pinkney's heirs claiming title to the lots on Wilkes street immediately north of that part of the property made as aforesaid by defendants, which lies between the west side of Caroline street and Spring street, together with a certain Klinefelter, took up said part of said property, and the square lying immediately west thereof, and running into Canal street, as vacant land, without they, the said Hammond and Pinkney's heirs, claiming the same by

virtue of their title to * the said lots on Wilkes street; and if they further find that neither said plaintiff nor any other proprietor of the lots on Wilkes street have ever paid or tendered to pay to the defendants, or any one else, the expense of making said property; that then, first, the lessor of the plaintiff is barred by the Statute of Limitations from recovering in this suit the land included within the lines of the defendants' defence as located upon the plats; or if not so barred, that then, second, the jury may and ought to presume that the proprietors of that part of Mountenay's Neck lying immediately north of the first line of that tract, as located on the plats from black M to black N, and immediately north of the ground so made as aforesaid by the defendants, and those under whom they claim, which was adjoining to and immediately west of the defendants' lots aforesaid on Bond street, as far as and including the whole of said ground embraced in the defendants' said defence, have granted the same to the defendants or those they claim under; or third, that then they may and must presume that the patent of Mountenay's Neck, in whom, at any time prior, riparian right to improve under the said Act of 1745, or those claiming under them, may have existed, had surrendered and granted to the defendants, or those under whom they claim such right, so as to authorize and entitle said defendants, and those under whom they claim, to improve, to the exclusion of such and those claiming under him, their said lots on Bond street to the same purpose and with the like effect as if they, the said defendants, and those they claim under, were, by virtue of grants from the State, the riparian proprietors of said lots prior, in point of time and right, to the said patentee and those claiming under him of Mountenay's Neck. 482

Whereupon the Court granted the first and sixteenth prayers of the plaintiff, and rejected her prayers numbered from two down to fifteen inclusive, and rejected the first, second and third prayers of the defendants, and granted their fourth prayer; to the granting of the fourth prayer of defendants, and to the rejection of her prayers from two to fifteen, the plaintiff excepted, and to the granting of first and sixteenth of * plaintiff's prayers, and to the rejection of their first, second and third prayers, the defendants ex- 483
cepted.

4th Exception. The Court having decided, as stated in the preceding exception, upon the several prayers of the plaintiff and defendants, the plaintiff gave in evidence the deed from Samuel Wheeler and Ann his wife, to David Jones, of 22nd March, 1685, heretofore offered by defendants, and it being agreed that all the evidence in the prior exceptions should be considered as a part of this exception, the plaintiff, by her counsel, prayed the Court to instruct the jury, as follows:

1. That there is no evidence of adverse possession, for twenty years before the institution of this suit; and that the plaintiffs are

not barred by any possession which the defendants or any of them have proved.

2. That the bar of adversary possession cannot apply in this case, unless it be shown to have been defined and uninterrupted; and that the defendants are not entitled to any portion of the land in controversy, not included in such definite and uninterrupted possession, and except so far as the defendants shall have shown such possession, and for the term of twenty years before the bringing of this suit.

3. That if the jury believe that the land in controversy did not become fast land, so that the water did not flow over it at ordinary tides, within twenty years before the bringing of this suit, then no adversary possession thereof can be found to bar the plaintiff's recovery.

4. That there is no evidence in this case from which the jury are at liberty to presume that any deed or grant was ever made by the lessor of the plaintiff or those under whom she claims, of the land in controversy, or the right to extend into the water.

5. That the jury cannot presume any such deed or grant, if they believe that the defendant Inloes claimed the right to extend his wharf, by virtue of his ownership, under title from his father, of the land on Bond street, and with permission of the city.

484 * 6. That the jury, to make the presumption of a deed or grant as above mentioned, must be satisfied that in point of fact a deed was executed by the plaintiff's lessor, or some one under whom she claims, of their interest in the land in controversy, or their right to extend the land into the water to the defendants, or some one of them.

All of which prayers the Court [ARCHER, C. J.] refused to grant. The plaintiff excepted.

5th Exception. The counsel for the plaintiff further prayed the Court to instruct the jury upon the evidence given, as stated in the preceding bills of exceptions, which is to be taken as a part of this bill of exception, that there is no evidence in this cause that any one of the defendants, except Inloes and Chapman, ever had possession of any portion of the property in dispute, even for a day, or made any entry into it, previous to the time when it was filled up and made fast land by the City of Baltimore in the year 1836, or when the jury may find that it was filled up; that there is no evidence that Chapman ever had possession of any of said property, or exercised acts of ownership over it previous to about the year 1826; and that if the jury believe the facts set forth in the plaintiff's first, second, and third prayers, then the plaintiff is entitled to recover against all the defendants except Inloes; which the Court [ARCHER, C. J.] refused to grant. The plaintiff excepted.

6th Exception. The patents and deeds of records offered in evidence by the plaintiff, being offered, subject to all exceptions to which the same might be liable, the defendants, by their counsel, ob-

jected to the admissibility in evidence of each and every of said patents, deeds and records; but the Court overruled the objection, and suffered each and every of said patents, deeds, and records to be given in evidence to the jury. The defendant excepted.

The parties then filed the following agreement, to wit:

It is agreed that the plats on file in this case, or made for the parties, may be used to every effect in the Court of Appeals, as if the same were copied and sent up with the record; and that the explanations in like manner may be used; and * that neither the plats nor the explanations need be copied into the transcript **485** for the Courts of Appeals. It is agreed, also, that the plat of the city designating the improvement to be made under the ordinance of 1823, may be also used without being copied with the transcript, and likewise the plat of Fell's Addition to Baltimore Town, of 1773; and that all the ordinances and laws given in evidence in the above case may be read in the Court of Appeals from the printed laws and ordinances, and that the same shall not be copied in the record. It is also agreed that the plot from the City Atlas of 1824, offered in evidence, shall not be inserted into the record, but a copy of the same, by A. J. Bouldin, may be used in the Court of Appeals.

The verdict and judgment being against the lessor of the plaintiff, she appealed to this Court.

Explanations of the plot published with this report, which however only contains such portions of the survey, as give a general view of the controversy.

1. The plaintiff claimed from W to X, then to the water of the City Dock, then bounding on the water of the Dock to Caroline street, and then on Caroline street to W.

2. The defendant took defence for all the land lying between the W. side of Caroline, and E. side of Spring street, and the S. side of Aliceana street, and N. side of Lancaster street.

3. M is the admitted beginning of Mountenay's Neck, as surveyed in 1737. for Wm. Fell, and the N. W. line from that point, is its first line.

4. Bold Venture was located by the plaintiff in three ways. The first line of which was from the southern A to M, and located as a tract for 161 acres. It was also located as clear of elder surveys according to the recitals in the patent of Rogers' Inspection, of the 28th Sept. 1759, in two other modes, the lines of both of which parcels are clear of this controversy, and do not affect it. In that patent the original grant is assumed to have encroached on elder surveys.

5. V to W to X and Y, shew the permission of the Port Wardens of Baltimore to John Hammond, in 1784. to extend his improvements into the water west of Caroline street, to the Port Warden's line on the south.

6. The deeds from John Cornthwaite to William Hammond, were so located by the plaintiff as to show a claim to the water line of the river at Y and V, the water at one time flowing to the shore at those points.

* 7. The defendants located W to X, to 109 to 110 and to W, as **486** being in their possession.

8. The defendants located Bold Venture as beginning at the southern A, and thence to M, and with the line from M to N, so as to include a part of the City Dock, and as conforming to the original grant for 161 acres.

9. The line of the water as it flowed in 1783, is shown by the dotted lines from A to Y, V, B, C, F, according to the depositions of E. Smith and William Dawson for the plaintiff.

10. The line of the water as it flowed in 1801, according to defendants depositions, is shown by the dotted line south of the preceding line from G to F.

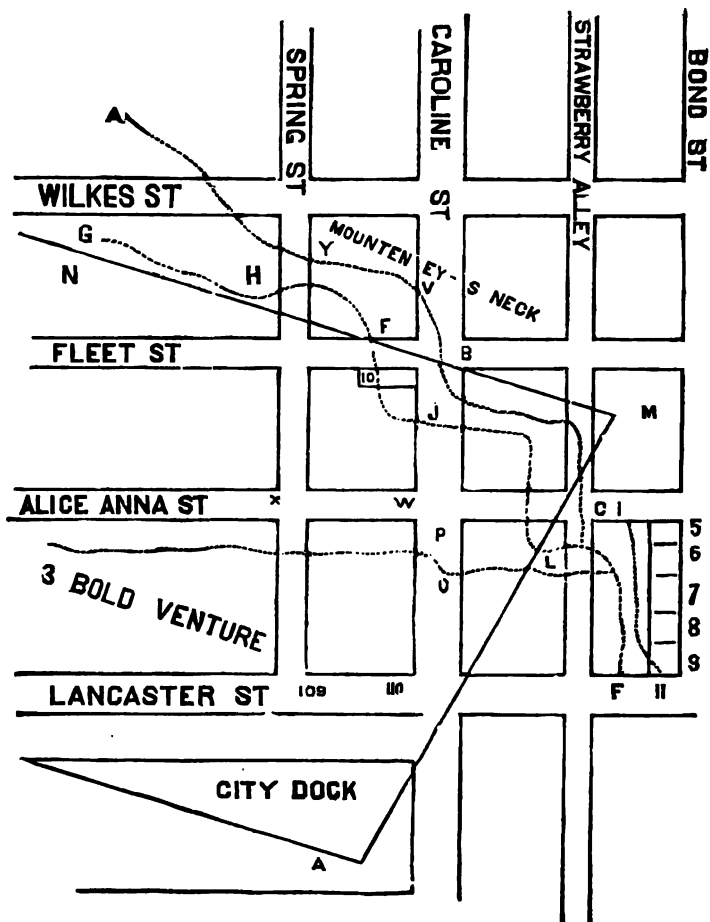
11. The dotted line from L to O, shows the line of logs run out by Joshua Inloes.

12. The dotted line from P to Q, west, shows the water fence as extended by William Inloes.

13. The numbers 5, 6, 7, 8, 9, show the leases from Ann Fell, on Bond street; No. 5 being to Abraham Inloes.

14. No. 1 to 11 shows the water in 1784, W of the leased lots which are located on the original plats with shaded lines as bordering on the water.

15. No. 10, located as the lease from John Hammond to Thomas McDowall, 28th February, 1798.



The cause was argued before DORSEY, CHAMBERS, and SPENCE, JJ.

Mayer and Dulaney, for the appellants. *Giles and McMahon*, for the appellees.

DORSEY, J., delivered the opinion of this Court. With the County Court's refusal to admit the testimony offered by the plaintiff in his first bill of exceptions, and objected to by the defendants, we entirely concur. It was immaterial and irrelevant to any of the issues in the cause. A prevalent opinion in the neighborhood, even if known and adopted by the lessor of the plaintiff, as to her legal rights, whether founded in error or not, does not at law prevent the running of the Statute of Limitations, nor repel the legal presumption of a grant arising from adverse possession, long continued and acquiesced in.

We also concur with the County Court in admitting to the jury the certificate of the rent roll, offered in evidence by the *defendants, as stated in the plaintiff's second bill of exceptions. 488 The rent rolls, which are books kept in the several counties of the State during the Proprietary Government of Maryland, by officers called rent roll keepers, were designed to show, in the respective counties, the grants of land made by the Lord Proprietary; the names of the subsequent alienees thereof; and the names of those who were in possession of the same; and the quit-rents with which they were chargeable. In all cases of controverted possession, or where possession was relied on as evidence for the presumption of a grant, certified extracts from the rent rolls, showing who were the possessors of the lands at the period in question, have been received by the Courts of Maryland as competent testimony. But though the evidence objected to was admissible, after the testimony previously given in the cause, it is difficult to conceive why it should have been offered by the defendant; or if offered, why objected to by the plaintiff. If adduced as evidence of the escheat grant to William Fell, it could neither benefit the defendant nor damnify the plaintiff; as the escheat patent itself, which is conclusive evidence of the fact, had already been in evidence before the jury. And if it were produced as evidence of William Fell's possession under his escheat grant, so far as it proved any thing, it disproved that fact, by showing that he never was in possession under his escheat grant, and that no quit-rents had ever been charged against him. It would be extremely difficult to account for the rent roll keeper's wholly omitting to charge William Fell with the quit-rents as the possessor of Mountenay's Neck, upon any other hypothesis, than that upon an investigation into the subject by the rent roll keeper, he discovered (what the testimony in this cause renders more than probable,) that William Fell took nothing under his escheat, and consequently was not charged with the payment of quit-rents. But the effect of this rent roll extract is not

only to disprove that William Fell was the possessor, or chargeable with the quit-rents of Mountenay's Neck, but it shows that previous to the year 1756, and more than two years before the conveyance from Edward Fell to * Thomas Sligh, Thomas Sligh and
489 Thomas Sheridine were the possessors of Mountenay's Neck, and charged with the quit-rents payable thereon. Facts strongly corroborating (if corroborating testimony were wanting,) the evidence the plaintiff had before offered in support of his claim and pretensions.

The plaintiff's counsel, by the first prayer in the third bill of exceptions, call upon the Court to instruct the jury, that, if they believe the facts enumerated in the prayer, "they are bound to presume a deed from said Alexander Mountenay, or those claiming under him, to Samuel Wheeler and wife, and from said David Jones to said Robert Blunt, or his ancestor, for the tract of land called Mountenay's Neck." These enumerated facts do not show that the plaintiff, or any of those under whom she has offered evidence of her deduction of title, ever held under either Wheeler and wife, or Jones, or received from them any conveyance of Mountenay's Neck, or that they, or either of them, ever were possessed of any part thereof. The only fact tending in the slightest degree to connect Wheeler and wife and Jones with the tract of land called Mountenay's Neck, is the isolated deed from Wheeler and wife, by Thomas Lightfoot, their alleged attorney, to David Jones. In the absence of all proof that Wheeler and wife were entitled to the land, or had been in possession of any part thereof, or that Robert Blunt, or those claiming under him, ever acquired, or claimed to hold title or possession under either Wheeler and wife or Jones, upon what ground could the Court be called on to direct the jury to presume a deed from Alexander Mountenay, or those claiming under him to Wheeler and wife, and from David Jones to Robert Blunt? There is not a scintilla of evidence from which it can be legitimately inferred that Blunt derived either title or possession from Jones, or that Wheeler and wife, or Jones, or any person claiming under them, were at any time in possession of the land in question. Upon what basis then could the plaintiff rest the presumption, which she demanded of the jury through the agency of the Court?

Had the plaintiff have required of the Court an instruction to the jury, that they must presume a deed for Mountenay's * Neck,
490 from Alexander Mountenay, or those claiming under him, to Robert B. Blunt, it would be difficult to discover a reason why it should not be granted. From Robert B. Blunt the paper or record title of the plaintiff was perfect, the only link, in her chain of title, which was wanting, was that from Alexander Mountenay to Robert B. Blunt. To supply this defect, by way of legal presumption, all that was requisite was to prove to the jury a continuous possession of twenty years or upwards, in Robert B. Blunt, or those claiming under him.

And of this fact there was abundant proof. Far more than from the antiquity of the possession proved, and nature and circumstances of the case, could reasonably have been required or expected. The conveyance of Robert B. Blunt to James Todd, for Mountenay's Neck, bore date on the fourth day of October, in the year sixteen hundred and ninety-five. Of Robert B. Blunt's possession, no direct proof has been offered; and none could reasonably be expected, after a lapse of nearly one hundred and fifty years. But of the possession of his grantee, James Todd, there is proof, and that too coming in such an unquestionable shape, that it cannot be doubted. About three years after the date of the deed from Blunt to Todd, on the 17th of February, 1698, the surveyor of Baltimore County, a public officer of the Lord Proprietary, who was upon the land and an eye witness of what he stated, who could have had no motive for misrepresentation, in the discharge of a necessary official act in respect to the survey of the tract of land called "Todd's Range," certifies to the register of the Land Office, that it began "at a bounded white oak, standing in the line of a parcel of land formerly belonging to Alexander Mountenay, and now in the possession of the aforesaid Todd." On the 13th of March, 1701, James Todd conveyed that part of Mountenay's Neck, connected with the present controversy, to one John Hurst, who, by deed of mortgage bearing date on the 13th day of October, 1702, to secure the payment of £123 6s 4d, conveyed the same to Richard Colegate, who, in the Provincial Court of the April Term, 1705, recovered judgment in ejectment for the said mortgaged premises against said Hurst; but no * writ of *habere facias possessionem*, as far as the record discloses that **491** fact, appears to have issued thereon. The institution of this action of ejectment to April Term, 1704, by Colgate against Hurst, is evidence that Hurst was, at that time, in possession of the mortgaged premises; as had they, at that time, been in the possession of any other person, the judgment could have been of no avail to the plaintiff. And the declaration describes the mortgaged premises sued for as late in the tenure or occupation of James Todd, of the aforesaid county, planter. Thus confirming, as to Todd's possession, the previous certificate of the surveyor of Baltimore County.

In March, 1749, John Hurst, in consideration of £5, conveyed to Thomas Sheridine and Thomas Sligh, as joint tenants, the same lands conveyed to him by James Todd. And on the 15th of November, 1750, in consideration of £100 sterling, John and Thomas Colegate, devisees of Richard Colegate, conveyed the same lands to said Sheridine and Sligh in joint tenancy. Whether the possession continued in Hurst till his conveyance to Sheridine and Sligh, or had previously passed from him to the Colegates, in this question of presumption of a deed, is of no importance; the plaintiff deducing a regular paper title from both, the possession of either is equally

available to the plaintiff. And there is not a shadow of proof that the possession was in any other person.

In June, 1756, Thomas Sheridine, the elder, being dead, his son and heir-at-law, Thomas Sheridine, conveyed the said lands to Thomas Sligh, reciting in part the said conveyance from said John and Thomas Colegate to Thomas Sheridine, the elder, and Thomas Sligh, and that the said Thomas Sheridine and Thomas Sligh, in virtue of the said conveyance, were jointly "seized and possessed" of the said lands, and that his said father died "so seized and possessed, living the aforesaid Thomas Sligh," "who now continues, as survivor, seized, and yet is actually possessed of the aforesaid lands." For falsely making such a recital, Thomas Sheridine, the younger, as far as the record discloses, could have had no conceivable motive.

492 * The extract from the debt books is evidence that Thomas Sligh, in 1754, was in possession of 100 acres, part of Mountenay's Neck; and the extract from the rent roll, given in evidence by the defendants, shows that in 1756, if not before, Thomas Sligh and Thomas Sheridine were stated by the rent roll keepers of Baltimore County, to be the possessors of 200 acres of Mountenay's Neck. And the said extract from the debt books show, that from 1755 inclusive, till the year 1759, when he conveyed a part thereof to Thomas Hammond, (under whom the plaintiff claims,) Thomas Sligh was possessed of the said 200 acres, part of Mountenay's Neck. For a period then of sixty years, that is, from 1698 to 1758, the plaintiff has shown a continuous possession in those under whom she claims title. A stronger case for presuming a deed, on the ground of possessions of an ancient date, has rarely occurred in a Court of justice.

But it is said that possession is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence. To this proposition, as applicable to the case before us, we cannot assent. If the possession relied upon were of modern date, so that it might fairly be presumed as susceptible of proof by living witnesses, then would the objection urged present itself with imposing force. But as to the possession in question, they are of so great antiquity, that the brevity of human life demonstrates that such testimony cannot be obtained. If the certificate of the surveyor be not evidence in this case, upon what principle is it that entries in the debt books are evidence to prove ancient possessions of lands? And if the recitals, in these deeds, as to possessions, be not evidence, upon what principle is it that you admit hearsay evidence of ancient boundaries or runnings of the lines of old tracts of land? Or, how is it that you admit entries made in the books of a third person by the person whose duty it was to make them, and to whom no inducement to have made false entries could be imputed? In *Mima Queen and child vs. Hepburn*, 7 Cranch, 290, the Supreme Court decided that hearsay evidence is incompetent to establish any

*specific fact, which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. But **493** what must we presume would have been their decision, if, of facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, hearsay evidence should have been offered? Why, that it was competent. The recitals here relied on are all made by persons wholly uninterested in the truth or falsehood of the facts recited.

It is also insisted that the plaintiff is precluded from relying on these possessions as furnishing a presumption for a deed from Mountenay, or those claiming under him, to Blunt, because Thomas Sligh having, in 1758, accepted a deed of conveyance from Edward Fell, the plaintiff, who makes title thro' Thomas Sligh, is estopped from setting up a title paramount, or alleging that she derived no title under the conveyance from Fell to Sligh. If this doctrine of estoppel, as here contended for, be sanctioned, the condition of Sligh, and those claiming under him, is deplorable indeed. Sligh is as thoroughly estopped by the deed from Hurst, and also by that from the Colegates, as he is by that from Fell. Their seniority or juniority neither adds to, nor detracts from their several efficacies as estoppels. If he sets up a title under the deed from Hurst, the reply would be, you have accepted a deed from the Colegates or Fell, and you are estopped from asserting a title derived in any other way. If he asserts his title under the Colegates, the deed accepted from Hurst or Fell would present to him a barrier equally unsurmountable. And the same would be the effect of either of the deeds from the Colegates or Hurst, if his title were insisted on under the deed from Fell. So that having made separate purchases of the titles of three claimants, he has no title at all; but if he had taken a deed from only one of them, he might perhaps have acquired an indefeasible title. The inconsistency and injustice of applying the doctrine of estoppel to a grantee, who claims nothing under the deed which he seeks to repudiate, cannot be more strongly illustrated than when attempted to be applied to a case like the present, where it is manifest that Sligh never, for a moment, *supposed, that in taking a conveyance from Fell he designed to relinquish and **494** abandon all the title to Mountenay's Neck, which he had acquired under the deeds from the Colegates and Hurst; and to admit that thenceforth he claimed no other title to Mountenay's Neck than that transferred to him by Edward Fell. That such was not the understanding of Edward Fell, is apparent from the terms of the deed, which do not profess, in the usual form, to convey the land itself; but simply the right, title and interest of Fell therein. In taking a conveyance from Fell, Sligh's only object was to purchase his peace, or remove a cloud which overshadowed his title. The difference in the amount of purchase money paid to the Colegates and Fell, fully sustains this view of the transaction. To the former, for their title,

was paid £100 sterling; to the latter, £50 current money. The deed from Fell to Sligh has performed its office, and consummated the contract between the parties. Fell has received his £50, and Sligh obtained as its equivalent the asserted claim of Fell. The deed between them never was designed to have any further or prospective operation; to all intents and purposes it is *functus officio*. That the distinction which we have taken, as respects estoppel, when applied to a conveyance of the land itself, and the mere interest of the grantor in the land, is well founded. See 4 *Ba. Abr.* 192, *Tit. Leases and Terms for Years*, letter O, and the authorities there referred to, where it is stated, that, "if a man takes a lease for years, of the herbage of his own land, by indenture, this is no conclusion to say, that the lessor had nothing in the land at the time the lease was made, because it was not made of the land itself."

The true ground upon which estoppels are applied to deeds is given in the case of *Jackson, ex dem. of Varick vs. Waldron and Wife*, 13 *Wendel*, 178, where it is said, that "the true principle of estoppel, as applicable to deeds, is to prevent circuitry of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other part to seek redress, against his * bad faith, by suit; but the Court will decide
495 upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed." And in *Blight's Lessee vs. Rochester*, 7 *Wheat.* 547, a most able exposition of the doctrine of estoppel is given by Chief Justice Marshall, showing that it does not or ought not to apply as between grantor and grantee, and preclude the grantee from showing a prior and superior title in the grantee, to that transferred by the deed of the grantor. The true doctrine upon the subject is also correctly stated in 4 *Ba. Abr.* 190, *Tit. Leases and Terms for Years*, letter O, as follows: "but if such lease for years were made by deed poll of lands, wherein the lessor had nothing, this would not estop the lessee, to aver that the lessor had nothing in those lands at the time of the lease made because the deed poll is only the deed of the lessor and made, in the first or third person; whereas the indenture is the deed of both parties, and both are, as it were, put in and shut up by the indenture; that is, where both seal and execute it, as they may and ought; for otherwise, if the lessor only seals and executes the indenture, the lessee seems to be no more concluded, than if the lease were by deed poll; for it is only the sealing and delivery of the indenture, as his deed, that binds the lessee, and not his being barely named therein, for so he is in the deed poll; but that being only sealed and delivered by the lessor, can only bind him, and not the lessee, who is not to seal and execute it. And it should seem, that such lease by deed poll binds the lessor

himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem he is bound by such lease by way of estoppel."

We think the County Court, therefore, erred in granting the plaintiff's first prayer in the third bill of exceptions.

The second prayer of the plaintiff, in third bill of exceptions, involving in it the decision of most of the defendants' * prayers, we will forbear to express any opinion upon it till we have disposed of the defendants' prayers. 496

The plaintiff's third prayer in this bill of exceptions calls on the Court for an instruction to the jury, that if, in addition to the facts stated in the first and second prayers, they also believe, "that the plaintiff, and those under whom she claims, have been in possession of the part of said property, by having a house erected upon it, and by the actual enclosure of a board fence, then the defendants cannot avail themselves of any title from presumption, except of such part as they can prove that they have also been possessed of, by actual enclosure, for twenty years, next before the impetration of the writ in this cause." And this prayer, we think the County Court ought to have granted, if it be assumed that, but for such presumption, the plaintiff is entitled to the property in controversy. The general principle being now too well established to require the adduction of authorities in its support, that a *possessio pedis* of part of a tract or parcel of land, by him, who is legally entitled to the entirety, carries with it the possession to the extent of his legal rights: and no wrong-doer can, in contemplation of law, by the entry or exercise of acts of ownership thereon, acquire the possession of any part thereof, but by actual enclosure, or ouster, actual or presumptive. But such an assumption of title in the plaintiff cannot be made, as we shall hereafter show, and therefore the prayer was properly rejected by the Court.

The instruction required by the plaintiff's fourth prayer was, "that the defendants in this case cannot avail themselves of the benefit of a grant to them for the property in dispute, unless they show by strong proof, a continuous and uninterrupted possession thereof, for twenty years, next before the institution of this suit." This prayer, we think, the County Court erred in not granting. Uninterrupted, continuous possession is essential to the presumption of a grant, and by "strong proof," was meant nothing more than such proof as would satisfy the jury of the existence of the fact, for the establishment of which it was offered.

* The fifth prayer was, "that there is no evidence in this case to prove such possession." The object, (the meaning) of which proposition was, that the evidence before the Court was not sufficient to authorize it in instructing the jury to presume a grant to the defendants. After a minute and thorough examination of all the facts in the case, and of the law which applies to them, we are of opinion, that this instruction ought to have been granted. The 497

grounds, upon which rest the presumption of a deed, are, that the rightful owner has so long submitted to acts of ownership over his property exercised by another, without ever having sued for the recovery of his property, or of damages for the unlawful invasions of his rights, that he is presumed to have granted them to him by whom the acts of ownership are exerted. Let us now see how far this presumption is applicable to the case before us, and ought to be insisted upon by the present appellant. To do this, we must bear in mind that the property, of which it is sought to deprive her, was not at the time of the alleged encroachments upon her rights, her freehold, or any tangible or visible property, or a franchise, or easement, of which she then had the capacity of enjoyment. It was a mere privilege of acquiring property by its reclamation from the water, and until reclaimed she had no property; no possession; no right which could be violated or encroached upon by any body. Inloes' fence, which from its duration is the only trespass or possession relied on as the basis of this presumption, it must be borne in mind, was erected in navigable water, and far without the limits of the land owned by the appellant. What action could the plaintiff, or those under whom she claimed, have maintained on account of the erection of Inloes' fence? Ejectment would not lie, there being no title in the land. Trespass, in which the law implies an injury, whether sustained or not, could not have been maintained, by reason of the want of ownership of soil, whereon the fence was erected. An action on the case could not be supported, because the gist of such action is actual damage or loss to the plaintiff; and the erection of Inloes' fence, so far from inflicting damage or loss, conferred a substantial * benefit, by aiding in the consummation of what

498 was indispensable to the fruition of the valuable franchise with which the plaintiff had been invested by the laws of the State and ordinances of the City of Baltimore. Upon what principle then of reason, justice, common sense, or analogy, can this doctrine of presumptive grants be applied to the case now before us?

But the nature and extent of the interest acquired by improvers, under the Act of 1745, ch. 9, and the state and condition in which the improvement must be, before any right of property vests in the improver, under the Act of Assembly, does not now, for the first time, arise in this Court. The decision in the case of *Giraud's Lessee vs. Hughes and al.* 1 G. & J. 251, unless overruled, is decisive, in the plaintiff's favor, of the question we are now considering. There, Christopher Hughes being the owner of the land running to the water, the defendants, on whom his interests devolved, claimed title to the land in dispute, as being an improvement made by his tenant, under the Acts of 1783, ch. 34, and 1745, ch. 9; and proved that his said tenant had, in pursuance of the provisions of said Acts of Assembly, made the said improvement, (which was a wharf,) so far as to enclose the same, by the necessary logs, in 1789, and had the

wharf filled up in the middle and north side thereof, and partly so on the east and south parts of the same; but that the logs of the said wharf, so made, had, "by injuries and decay in several parts, fallen down, (the top log entirely around,) and have not been repaired since: that part of the ground, filled up within the logs, had been, and still is, used and occupied as a distillery of turpentine; and that the water flows all round over the logs of said wharf, and within the same, from ten to twenty feet, according to the state of the tides." That in 1789, his said tenant having moved off, the said Christopher Hughes took possession of the premises, and by himself, his tenants, and the defendants, his heirs-at-law, held the said wharf ever since, till the trial of the cause in 1828. In that cause, the Court of Appeals decided, that, in order to vest any title in the wharf, it * must be completed; and that by reason of such incomple-

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tion of the improvement, neither Christopher Hughes, nor his tenant, had acquired any title thereto, under the said Acts of Assembly. Without overruling this decision, can it, for a moment, be contended that William Inloes, by erecting and keeping up a straight line of fence, in the manner described by the testimony in the case before us, acquired a title to the property now in controversy? And if so, to what extent does this extraordinary fence confer title on its owner? Does it vest in him all filling up that may be caused by it, either immediately or remotely; to the north or to the south; to the east or to the west? Nay, it is relied on, as not only giving title to William Inloes, but to all the other defendants, who hold their lots by separate leases, wholly unconnected with, and independently of, William Inloes. Upon what ground this reliance is placed, it would be difficult to conjecture. If, in virtue of this fence, a deed is to be presumed to Inloes from the owner of the water rights of Mountenay's Neck, (which rights, the raising of the present question of course concedes,) then is he entitled to the entire improvement, in dispute, to Lancaster street, to the utter exclusion of his co-defendants. In making this fence, Inloes, according to the proof, never designed to do more than extend and fill up his own lot; and upon no conceivable principle could any presumption of a deed cover more than the extension in front of his own lot, which would leave his co-defendants wholly unprotected against the claim of the plaintiff, by any presumptive bar, from ancient, continuous, adversary possessions. But suppose it were conceded, that the lines of Mountenay's Neck did, by their original location, embrace the land now in controversy, would that enable the defendant Inloes to hold it upon the principle of the presumption of a deed to him? The only ground for such a presumption rests on the construction and continuance of his fence, as stated by the witnesses. This fence, it will be borne in mind, at neither end, nor at any part of it, touched his enclosures or soil, nor was it connected with any thing, natural or artificial, which could

render it an enclosure or possession of any thing more than
500 * the ground which the fence itself covered. In its original construction, it was nothing more than a mere trespass, and its subsequent repairs were, as well in fact as in law, but repeated trespasses. In 3 H. & McH. 621, *Davidson's Lessee vs. Beatty*, the Court say, that, "where a person shows title to a tract of land, as for instance, Black Acre, and is in possession of part, possession of part is possession of the whole." And in such a case, "where a person claims by possession alone, without showing any title, he must show an exclusive, adverse possession by enclosure, and his claim cannot extend beyond his enclosures." "Where two are in possession of a tract or a house, it is his possession, who has the right." In *Chaney vs. Ringgold's Lessee and al.* 2 H. & J. 87, this Court say, "when two are in mixed possession of the same land, one by title, and the other by wrong, the law considers him, having the title, as in possession to the extent of his rights." And in *Hall vs. Gittings*, 2 H. J. 112, that "where two persons are in possession of land, the one by right, and the other by wrong, it is the possession of him who is in by right." The Supreme Court of New York have decided, in *Jackson vs. Camp*, 1 Cowen, 609, that, "entry under claim of title, is generally sufficient to constitute an adverse possession, and it is not immaterial whether the title be valid or not." "But if claim is not founded on a deed or writing, the possession is limited to actual occupancy and substantial enclosure, definite and notorious." And in *Jackson, &c. vs. Schoonmaker*, 2 Johns. 230, that "to make out an adverse possession in ejectment, the defendant must show a substantial enclosure, an actual occupancy, definite, positive and notorious; it is not enough to make what is called a possession fence, merely by felling trees and lapping them one upon another round the land." Upon the principles of these adjudications, how can it be contended, that simply upon the possession arising from Inloes' fence, you are to presume a conveyance, (as far as the fence indicates, of indefinite extent,) of the land lying to the north, south, east and west of it? And such conveyance is to be presumed, not only to Inloes himself, but to all other * lessees, deriving distinct and independent
501 titles from the lessor of Inloes. As authority against the raising of such a presumption, see the case of *Lessee of Potts vs. Gilbert*, 3 Wash. C. C. Rep. 475.

The extent to which lot owners may make their improvements, in reference to each other, under the Act of 1745, cannot, at this time of day, be a subject for contest. In *Dugan and al. vs. The Mayor and City Council of Baltimore*, 5 G. & J. 367, this Court declared that this Act of Assembly vests, in the improver, no title to improvements not made pursuant to the provisions thereof. That "the improvements, authorized and encouraged, were those made by improvers in front of their own lots, not of their neighbors. The Legislature never designed such an invasion of the rights of private

property; nor, indeed, had they the power to legalize it, if such had been their design." A similar construction had been previously given to the Act of 1745, in *Harrison vs. Sterett*, 4 H. & McH. 550.

The right of extending her lot, or wharfing out to the city dock, under the Act of 1745, and the ordinances of the City of Baltimore, was a franchise; a vested right, peculiar in its nature; a quasi property, of which the lessor of the plaintiff could not lawfully be deprived, without her consent. And if any other person, without her authority, made such extension, no interest or estate in the improvement vested in the improver, but it became the property and estate of the owner of the franchise. The fact that the improvement was made by the city officers or agents, and paid for by the defendants, does not at all vary the case, or change the relative rights of the parties, as was correctly decided by this Court in the case of *Wilson vs. Inloes*, 11 G. & J. 351.

On the part of the defendants, it has also been contended, that Mrs. Casey, and those under whom she claimed, having stood by and seen Inloes expend his money in erecting his fence and repairing the same, on the property now in dispute, and giving no notice of her or their title to the same, are ever after precluded from asserting their rights to the prejudice of Inloes, * and those claiming under him. But there is no ground for such a defence in this case. 502 The plaintiff's right to the privilege in controversy, must be presumed to have been as well known to Inloes, as to the plaintiff, and the giving of notice would have been an act of supererogation. The true doctrine applicable to such cases, was decided by the Court in the case of *Gray vs. Bartlett*, 20 Pick. 186, that where one stands by and sees another laying out money upon property, to which he himself has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one, who claims under some trust, lien or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice.

The sixth prayer asks the Court to instruct the jury, "that the defendants cannot be allowed to avail themselves of any possession, so as to defeat the title of the plaintiff, further than such possession is located on the plats in this case." And in refusing it, we think there was error: it being a well established principle of the ejectment law of Maryland, that where defence is taken on warrant, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots in the cause.

In refusing the seventh prayer of the plaintiff, (which is, "that the acts and possession of any one of the said defendants, cannot

avail the other defendants, by affording to them the benefit of a presumption of a grant,") we think the County Court also erred. There is no evidence to shew any possession in any person, under whom two or more of the defendants claim to derive title; but on the contrary, they all claim title under separate and independent leases. There is no privity of any kind between them. They all possess distinct rights of extending their respective lots into the water. How then can the presumption of a grant, founded on the long continued

503 * possession of the owner of one lot, enure to the benefit of the owner of a separate and distinct lot, of which no such possession had ever been held ?

We approve of the County Court's refusal of the eighth prayer, "that before the jury can find a title in the defendants, or any one of them, by presumption of a grant from the plaintiff, or those under whom she claims, they must believe in their conscience, and find as a fact, that such grant was actually made." The granting of such a prayer would have had a tendency to mislead the jury, by inducing them to believe that the presumption of a grant could not be made, unless the jury, in point of fact, believed in the execution of the grant; whereas, it is frequently the duty of the jury to find such presumption, as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant.

The ninth prayer was properly refused, not only for the reason we have stated in support of the refusal of the eighth prayer, but because it confined the jury to the finding of a deed executed by the plaintiff herself, and would have precluded them from finding, if the proof had warranted it, a deed from any of the grantors, under whom she might claim.

The tenth prayer, we think, ought to have been granted for the reasons stated by us in the consideration of the Court's refusal of the fifth prayer.

The eleventh prayer also, the County Court should have granted. The possessions of the defendants on the east side of Caroline street, not interfering with or being adverse to any of the rights of the plaintiff, or those under whom she claimed, could form no basis for the presumption of a deed for the property in dispute, which lies wholly on the west side of Caroline street. That the title of the rightful owner, in a case of mixed possession, (which is the most favorable condition in which the defendants can be regarded,) cannot be barred "by adding together the different possessions and acts of the defendants, at long intervals, in point of time, so as to make out twenty years," is a principle too well settled to require a reference to authorities to sustain it. Upon every discontinuance

504 * of the possession of the wrong-doer, by operation of law, the possession of the rightful owner is restored: and nothing short of an actual, adverse and continuous possession for twenty years, can destroy his rights, or vest a title in the wrong-doer.

The twelfth prayer too, we think, should have been granted, as well from the nature of the plaintiff's rights, to which the statutory bar is attempted to be interposed, as the total insufficiency of the possession and acts relied on as constituting the bar.

The thirteenth prayer is as follows: "If the jury find the patents, deeds and ordinances, offered in evidence in this cause, by the defendants, and that they were so offered by the defendants to show that they had the superior, better and more ancient right to extend, fill up and improve in front of their own lots, than the plaintiff, and those under whom she claims, have in front of her lot, then no possession which has been proved in this case on the part of the defendants, or any of them, can give rise to a presumption of a grant to the defendants from the plaintiff, as the claim of a better title on the part of the defendants than the plaintiff ever had, if the jury find that such claim is wholly inconsistent, and at war with such presumption." In refusing this prayer, the County Court, we think, were right for two reasons. First, because it requires the Court to instruct the jury, that if the patents, deeds and ordinances were offered to shew a claim to a superior title in the defendants, then they cannot presume a deed to the defendants, because such claim is inconsistent with such presumption; although, for aught that appears in the prayer, the jury might believe, that at the date, and during the continuance of the possessions and acts of the defendants, they the defendants had no knowledge of such their claim to a superior title, and did not rely on it, but held the possession, and did the acts referred to, under a knowledge and admission of the original superiority of the title of the plaintiff, and those under whom she claims; and that the defendants claimed to hold their possession in virtue of a deed to them from the plaintiff, or those under whom she claimed. The author of the prayer doubtless * designed that the Court's instruction should have been given upon the **505** assumption that the possession and acts of the defendants were the result of their claim of original superiority of title, but such was not the state of facts, on which the instruction was refused by the Court. And secondly, we approve of the Court's rejection of this prayer, even if it had been presented upon the statement of facts, on which, we presume, it was designed to have been based. When a Court, as an inference of law, arising from proof of possession, directs a jury to presume a deed, it is done, upon the principles of public policy, for the protection of ancient possessions, not upon the ground that it believed that the deed presumed ever had an existence in point of fact, or that the party relying on such possession, either at its commencement, or during its continuance, claimed to hold under any such deed, or was silent as to the claim under which he held. The inference of law would be the same; the Court would direct the jury to make the same presumption. All that the law requires to raise the presumption, is, that the possession should have been actual, ad-

verse, exclusive and continuous, and under claim of title. If the presumption of the deed was a matter of fact, which the jury were only authorized to find on their belief of its existence, and the evidence of possession, which was the basis of the presumption, was taken and held under claim of a distinct and different title, then it would be competent for the Court to instruct the jury, that there was no evidence whereon the existence of such a deed could be presumed.

The fourteenth prayer was properly rejected by the Court below. It called on the Court to instruct the jury as to the effect of the patent of a tract of land called "Fell's Prospect," which was neither located upon the plots, nor given in evidence to the jury. It also asked the Court's instruction to the jury, that the defendants cannot claim under the patent of "Island Point," as a subsisting independent patent, but they must claim, if at all, by the relation to it, of the patent of "Fell's Prospect;" a prayer which this Court could not grant, as Long Island was not only granted under the alleged patent of "Fell's * Prospect," to Edward Fell, under which the de-
506 fendants claim title, but was devised to Edward Fell by the last will and testament of his father William Fell, in 1746, to whom "Island Point" was granted, by patent bearing date in 1734.

The fifteenth prayer demanded an instruction, "that even if the the jury should believe from the evidence, that Thomas Sligh claimed under the escheat patent of Mountenay's Neck to Edward Fell, (meaning William Fell,) in the year 1737, still the said Thomas Sligh, and those claiming under him, have a right to go back, by relation, to the original patent of Mountenay's Neck in 1663, and to date their title from that period." In opposition to this prayer, a variety of grounds have been strongly urged. First, it is insisted that an escheat grant creates "*feudum novum*," operating only from its date, independently and unconnected with the original grant, and that the doctrine of relation has no application to such grants; that upon the failure of the heirs of the first grantee, or the occurrence of other cause of escheat, the land vested in the Lord Proprietary, or vests in the State, since the organization of our State government, as a part of the public demesne, and is held by the Lord Proprietary, or the State, and the escheat grantee, as if no previous grant had ever been made of it. We do not deem it necessary to examine the various authorities referred to, as shewing the character in which the Lord Proprietary or State acquires, or the nature of the interest acquired in, lands liable to escheat. Sir William Blackstone, in the 2nd volume of his *Commentaries*, p. 245, in speaking of the title which the Lord of a Seignory acquires by an escheat, says: "Sir Edward Coke considers the lord by escheat, as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent, in a kind of caducary succession." And in *Matthews vs. Ward's Lessee*, 10 G. & J. 451, this

Court have said: "In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir, * the State is *ultimus hæres*, and takes the property for the benefit of all." *Ultimus hæres*, of what, did Sir Edward Coke, or this Court mean? Assuredly, of that to which the person was entitled, whose death, without heirs, created the escheat. An escheat grant, in one sense of the term, is the creation of a *feudum novum*: that is, the grantee takes the property granted, as a new *fief* or *feud*, as regards his relationship, obligations and duties to the State. And what may be said of the State, is true as to the Lord Proprietary. He takes the estate granted upon the terms specified in the grant. But what is the estate granted? What are its limits, privileges, appurtenances, and priorities? To what liens and incumbrances it may be subjected, are matters existing independently of the inquiry, whether the grant be of a *feudum novum*, *aut antiquum*. When the State acquires title to land by escheat, it is not thereby invested with that, only, which it originally granted, and nothing more or less. It is invested with all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person, by reason of whose default of heirs, it had become escheat. The State, thus succeeding to the rights of such person, takes the property subject to all liens and incumbrances imposed upon it by him, or those under whom he derives title. And the escheat grantee, upon the terms specified in his grant, takes the estate granted, in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment.

To prove that an escheat grant does not relate to the original grant, and pass to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat, no authority has been referred to. And that the reverse is the well settled law of Maryland, appears by reference to the case of *Hall vs. Gittings*, 2 H. & J. 112, where the Court say: "An escheat grant relates to, and operates to pass, the whole of the original tract escheated." And to the case of *Howard vs. Moale*, 2 H. & J. 250, where "the Court refused to direct the jury, that * an escheat grant did not include any land included in the original grant, except the same was included within the metes and bounds of the escheat grant, as particularly described; and that the escheat grant did not, by legal operation, convey all the land included within the original grant, unless the particular metes and bounds of the escheat grant did also include the same;" and said that "a grant for escheat land will relate back to the original grant." And that "an escheat certificate and grant do, by operation of law, relate to the original tract, and is strictly within the principle and

rule of law of relation between grants and certificates." The same doctrine will be found in *Dorsey on Ejectment*, 78.

But it is insisted on the part of the appellees, that, conceding Mountenay's Neck, the original, to have carried with it the title to the property now in controversy, by the escheat grant to William Fell, of "Island Point," in 1734, this title or franchise was granted to William Fell, and became appurtenant to Island Point, under whom the appellees claim. Without inquiring whether, under any state of circumstances, such could be the effect of the escheat grant of Island Point, let us see whether such could be the construction of that grant, even conceding, that in terms it had embraced land included within the limits of Mountenay's Neck. The appellees first insist, that although it should be conceded that Mountenay's Neck was not liable to escheat in 1734, when the patent for "Island Point" issued; yet, that the Lord Proprietary is estopped from denying that it was so escheatable, and that whether then escheatable or not, is a matter of no importance, as the grant passed the contingent or possible right of acquiring the property by escheat, which right was then in the Lord Proprietary. And in support of the latter proposition, the case of *Bladen's Lessee vs. Cockey*, 1 H. & McH. 230, has been referred to, as shewing that the relation of an escheat grant to the original grant, shall not defeat an intermediate grant, including the lands contained in the original grant. In the regular report of that case, no such question appears to have been decided by the Provincial Court or Court of Appeals. But the reporter * appends 509 "a note of Samuel Chase, Esq., then a practising attorney of the Provincial Court," stating, "it has been determined that the relation of an escheat to the original certificate, shall not defeat mesne lawful grants." This was the case of *Bladen's Lessee vs. Cockey*, (about October, 1776,) the substance of that case was as follows; a tract of land called "Carse's Forest," was originally granted to Robert Carse, in 1696. It was granted to George Stewart as escheat in 1746. In June, 1721, the same land was granted to John Cockey, by the name of "Cockey's Folly." The question was, whether the grant to Cockey in 1721, was not an elder title than the escheat grant to Doctor Stewart in 1746, under whom Bladen claimed. Whether "Carse's Forest" was escheatable in 1721 or not, does not appear. If it were, then was the decision, imputed to the Provincial Court, in perfect accordance with subsequent decisions in this State upon like questions. But if the fact were otherwise, then must we express our decided dissent from this alleged decision of the Provincial Court. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary, in a relation to it, was a mere possibility, and could not be the subject of a grant. Such in effect was the decision in the case of *Partridge's Lessee vs. Colegate*, 3 H. & McH. 340. And in *Hall vs. Gittings*, 2 H. & J. 112, the Court say "escheat is that possibility of interest which reverts to or devolves on the

lord, upon failure of heirs, of the original grantee, and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing; and land not liable to escheat at the time it was included in a grant on a survey made in virtue of an escheat warrant on another tract, but which afterwards become escheat, will not pass under such grant, and the State is not estopped from granting it to any other person." And in *Howard vs. Moale*, 2 H. & J. 250, the Court decided, that "a grant of land, surveyed under a common warrant, will not pass land not then liable to escheat, but which afterwards became escheat, and as such was granted to a third person." But apart from these decisions, the inapplicability of the doctrine of estoppel * to grants of land made by the State or Lord Proprietary, is clearly shown in *Codman and others vs. Win-* 510
slow, 10 Mass. Rep. 155. Such grants and patents issue upon the statement of facts made by the grantees, and the recitals and assumptions of facts, therein contained, are, in fact, but the suggestions of the grantees. In such grants or patents, nothing passes but the title which the grantor then possessed, not that subsequently acquired.

But it is urged by the appellees, that conceding the law to be, as we have stated it, that it does not apply to William Fell's patent for "Island Point," in 1734, because "Mountenay's Neck" was then liable to escheat, of which liability, the only evidence offered, is the escheat warrant and patent to William Fell of Mountenay's Neck, in 1737. An escheat grant is *prima facie* evidence that the land granted is liable to escheat. But liable at what time? At the date of the issuing of the escheat warrant, and not antecedently. The escheat warrant for "Mountenay's Neck," which issued in April, 1737, is no evidence of its liability to escheat in 1734.

Suppose, however, we are wrong in the views we have taken of the operation of the grant of "Island Point," in 1734, and that it passed to the patentee a portion of "Mountenay's Neck," or of the franchises incident to it; of what avail is it to the appellees? William Fell, by the patents of 1734 and 1737, being entitled to both tracts of land, and his devisee, Edward Fell, having, by his deed of 1758, conveyed "Mountenay's Neck" to Thomas Sligh, it passed to him, with all its appurtenances, in the same manner that it was held under the original patent of 1663. See the case of *Mundell vs. Perry*, 2 G. & J. 193.

As far as regards any conflict of rights between these parties, Inloes and the other defendants had, under the Act of 1745, a right to extend westwardly, in front of their lots, to the line of the eastern end of the City Dock, extended northwardly; that is to say, to the west side of Caroline street, and no farther; and the lessor of the plaintiff had the right to extend her grounds to the City Dock, at the south side of Lancaster * street. Upon the foregoing 511
views, this Court think that the plaintiff's fifteenth prayer ought to have been granted.

The Court below erred in granting the plaintiff's sixteenth prayer, upon the grounds stated by us in the examination of the propriety of its granting the plaintiff's first prayer in the third bill of exceptions.

We concur with the County Court in their refusal to grant the defendants' second and third prayers, and dissent from its granting the defendants' fourth prayer in the third bill of exceptions, upon the grounds we have stated in reviewing the Court's opinions upon the various prayers of the plaintiff, contained in that exception.

And we concur with the rejection of the second and third prayers for an additional reason. In those prayers, they put to the jury the finding of such facts, none of which relate to the acquirement of title by the defendants in virtue of possession; and these prayers are predicated upon the assumption, that the defendants had shewn a clear paper title to their several lots, by means of which they assert a title to the property in dispute. But this assumption of title is wholly unsustained by the evidence before the jury. They severally claim title to their respective lots under leases from Ann Fell, who, by the record, is not shown to have had any title to the lots attempted to be leased. And, waiving this defect, which, of itself, is an insuperable objection to the Court's instructing the jury that the defendants are "the elder riparian owners of the water lots on Bond street," the Court could not have granted the prayer, because the only evidence to show William Inloes (apart from his possession,) was entitled to lot number five, was, that he was the heir of Abraham Inloes, the lessee for a term of years.

The first prayer of the defendants, "that if the jury find that the tract of land called 'Bold Venture,' was granted as given in evidence by the defendants, and that the same is truly located on the plats in the cause by defendants, that then the patent of 'Mountenay's Neck' gives no title to the lessor of the plaintiff to the lot of ground for which the defendants have taken the defence on the
512 plats," we think ought to have been * granted. "Bold Venture," embracing all the land between the line of "Mountenay's Neck," from M to N, and the City Dock, covers of course, the ground now in controversy, as effectually as if it had been fast land, at the time the "Bold Venture" was originally surveyed. The Act of 1745, ch 9, never was designed to give one land-holder the power of extending his improvements over the land of another. If such had been the design of the Legislature, it possessed not the power of affecting it, in the mode provided by that Act of Assembly. The grant of "Bold Venture," though for the most part covered with water, still passes to the grantee all the soil, under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public, as to fishing and navigation. If it had been encroached on by any person, as by driving of piles and erecting a wharf, or building a house thereon, an

action of trespass or ejectment could have been maintained by the patentee, or those claiming under him. See the case of *Brown vs. Kennedy*, 5 H. & J. 210.

Upon the views we have expressed in relation to "Bold Venture," we could not do otherwise than approve of the County Court's refusal to grant the plaintiff's second prayer in the third bill of exceptions.

From what we have said in relation to the three preceding bills of exceptions, it follows, that we dissent from the County Court's refusal to grant the four first prayers of the plaintiff in the fourth bill of exceptions; but concur with it in its refusal of the fifth and sixth prayers of the plaintiff.

As "Bold Venture" bars the plaintiff's recovery as against any of the defendants, we approve of the County Court's refusal to grant the plaintiff's prayer in the fifth bill of exceptions.

No ground of error has been suggested to us, and we have discovered none, in the Court's admitting the testimony objected to by the defendants in the sixth bill of exceptions.

We approve of the acts of the Court in the first and second bills of exceptions, and of their refusal to grant the plaintiff's second, eighth, ninth, thirteenth and fourteenth prayers, and * the defendants' second and third prayers in the third bill of ex- **513**
ceptions, but we dissent from the Court's granting the first and sixteenth prayers of the plaintiff, and its refusal of the plaintiff's third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth and fifteenth prayers, and the defendants' first and fourth prayers in the said exception; and concur with the Court in its refusal of the four first prayers of the plaintiff in the fourth bill of exceptions, and dissent from its refusal of the plaintiff's fifth and sixth prayers; and we concur with the County Court in its refusal of the plaintiff's prayer in the fifth bill of exceptions, and also with its overruling the defendants' objection to the testimony mentioned in the sixth bill of exceptions.

Judgment reversed, and procedendo awarded.



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ACTION.

See **BILLS OF EXCHANGE**, 3, 7, 8, 9, 11.

FEES.

AMENDMENT.

1. An application for an amendment of pleadings is not a demand of a matter of right, but is an appeal to the sound discretion of the Court, and to be granted when it shall appear necessary to bring the merits of the question between the parties fairly to trial. *Gordon vs. Downey*, 30.
2. Where an application is made to the Court to withdraw a general issue plea, and file a general demurrer, and the defendant's exception to a refusal to grant that privilege did not state the existence of any necessity for such amendment, and it did not appear that the amendment if made would have given the defendant any new defence, it is not error in the County Court to refuse the amendment. *Ib.*

APPEAL AND ERROR.

1. Where, in the progress of a trial, the defendant excepted to instructions granted in favor of the plaintiff, and afterwards the judgment was arrested, but upon the appeal of the plaintiff, reversed, this Court will not enter final judgment, but remand the cause for judgment on the verdict to the County Court, in order that the defendant may have an opportunity of appealing from the instruction given against him. *O'Reilly vs. Murdoch*, 24.
2. Where the plaintiff counts upon a contract assigned to him, followed by an express promise by the defendant to pay him the sum alleged to be due under it, and the bill of exceptions does not show that the plaintiff had closed the testimony on his part, it is error in the Court, upon the motion of the defendant, to reject the proof of the assigned contract. *Gordon vs. Downey*, 30.
3. In virtue of the Act of 1831, ch. 319, this Court is required in appeals from certain County Courts enumerated in that Act, to decide upon all the bills of exception taken at the trial below, whether appealed from or not. *Ib.*
4. Where the County Court, after verdict for the plaintiff, upon motion arrested the judgment, and there was no error in the bills of exceptions taken by the defendant, this Court overruling the motion in arrest, will proceed to enter final judgment upon the verdict for the plaintiff. *Ib.*

APPEAL AND ERROR.—*Continued.*

5. A defendant below, cannot assign for error (when appellant,) the results of any of his own modifications or additions to the prayer of the plaintiff below. If there be any error for which a judgment in this case should be reversed, it must be found in the addition made by the plaintiff to the instruction as modified and amended at the defendant's instance. *Calvert vs. Coxe*, 72.
6. It is error in the County Court to instruct a jury absolutely, though they might have been authorized to grant the same instruction hypothetically. *Ib.*
7. To entitle an appellant to a reversal for error in instructions he must make good all the propositions contained in his motion, however numerous they may be. *Whiteford vs. Burekmyer*, 96.
8. Where a record of proceedings in Chancery does not appear in the bill of exceptions, this Court cannot decide whether the County Court erred in rejecting it as evidence or not. *Duvall vs. Peach*, 182.
9. Under the Act of 1825, ch. 117, Rev. Code, Art. 71, sec. 7, this Court is not permitted to affirm or reverse the judgment of the County Court upon any point, which is not shown by the record to have been there raised and decided. *Leopard vs. C. & O. Canal Co.* 169.
10. Where the plaintiff below obtained a verdict, and the defendant brought the cause before this Court on exceptions, and it appeared that the contract relied on and proved, was void under the Statute of Frauds, being a collateral, and not an original undertaking. After a reversal of the judgment, the plaintiff's motion for a *procedendo* was overruled. *Conolly vs. Kettlewell*, 199.
11. This Court will not pronounce upon the rights of a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims. *Bowling vs. Lamar*, 278.
12. The Orphans' Court passed certain claims against a deceased's estate: when the administrator came to settle his administration account, the claims were objected to, and full proof of them demanded, but the Court allowed them. Upon appeal, this Court reversing the decision of the Orphans' Court, remanded the cause without prejudice, with liberty to take further proof. *Ib.*
13. By the Act of 1830, ch. 185, it was declared that no appeal shall hereafter be allowed from any decree or order of the Court of Chancery, unless it be a final decree or order in the nature of a final decree. *Held*, that an appeal from an order referring a cause to the auditor, for an account, with directions as to the mode of stating it, was not authorized under that Act. *Durrington vs. Rogers*, 307.

See ATTACHMENT, 10, 11.

EQUITY, 1, 8.

ASSIGNMENT.

1. By the Act of 1829, ch. 51, Rev. Code, Art. 64, sec. 41, any assignee, *bona fide* entitled to any judgment, bond, specialty or other *chose in action* for the payment of money, by assignment in writing, signed by the person authorized to make the same, may by virtue of such assignment sue and maintain an action, &c. in his name, &c. against, &c. *Held*, that an instrument of writing which bound the defendant to pay a money rent, let a third party have a portion of the pro-

ASSIGNMENT.—*Continued.*

duce of the demised premises, and furnish the means of carrying it away, was not such an instrument, as under that Act, would authorize an assignee to maintain an action in his own name. *Gordon vs. Downey*, 30.

2. The *chase in action* contemplated by the Act of 1829, ch. 51, was one purely for the payment of money; and where the assignor if no assignment had been made, could only maintain an action for non-payment of the money. *Ib.*
3. But where money is due under such a contract, and the defendant promises the assignee to pay the same, this will enable the assignee to sue independent of the Act of 1829, ch. 51, upon the express promise. *Ib.*

See EXECUTORS AND ADMINISTRATORS, 5.

TAX AND TAX COLLECTOR, 2.

ATTACHMENT.

1. After a judgment of condemnation has been rendered in an attachment cause, if the defendant desire to move to quash the writ, regularly he should first move to strike out the judgment, and then make his motion to quash. *Boarman vs. Patterson*, 283.
2. Without the short note showing the plaintiffs' cause of action, and the issuing thereon of a *capias ad respondendum* or a summons, (as the case may be,) the proceedings in an attachment would be wholly irregular. *Ib.*
3. Nothing ought to be recovered by a condemnation of the property attached, which was not recoverable from the defendant, had he given special bail, and appeared to the process issued against him. *Ib.*
4. Where the short note states a cause of action in assumpsit, and the writ issued was in trespass upon the case, matters for which debt or covenant was the only remedy could not be recovered. *Ib.*
5. A short note cannot be amended from assumpsit, to debt or covenant, where the writ is in trespass upon the case. *Ib.*
6. It is no ground for quashing an attachment that some specific portions of the claim as made could not be recovered under the short note. *Ib.*
7. Where the creditor deposes "that he is credibly informed, and verily believes, that the said J. B. (the debtor) has removed from his place of abode with intent to injure and defraud his creditors," this is a sufficient compliance with the Act of 1795, ch. 56, sec. 1, in that particular. *Ib.*
8. A judgment on attachment which not only condemns property towards satisfying that portion of a plaintiff's demand which might be recovered under the short note, but also to satisfy that which could not be so recovered, is erroneous. *Ib.*
9. Where the plaintiff exhibits a claim for principal, and with interest added, up to a given day, it is error in the County Court to enter up a condemnation for the gross sum as bearing interest from the day on which the attachment issued. The charge of interest upon the interest was not warranted under such circumstances. *Ib.*
10. But this Court will not reverse a judgment of condemnation in an attachment cause upon an appeal from such judgment, for such

ATTACHMENT.—*Continued.*

error because it does not appear to have been presented to the consideration of the County Court. *Ib.*

11. If there be an error in the attachment proceedings, by reason of which the jurisdiction of the Court does not appear, it would, after verdict, be a fatal objection on a motion in arrest, or, without raising the objection below, it might be assigned as error in the Court of Appeals. *Ib.*
12. What is a sufficient return by the sheriff to an attachment. *Ib.*
13. Under the Act of 1795, ch. 56, sec. 1, unless the affidavit of the creditor contain an averment of citizenship as to both creditor and debtor, no attachment against an absconding debtor can lawfully issue. *Ib.*
14. Where the affidavit is designed to procure a warrant for an attachment against the effects of an absconding debtor, under the Act of 1795, and does not contain an averment of his citizenship of Maryland, it is substantially defective; and upon an appeal from a judgment of condemnation rendered upon it, without a motion to that effect in the County Court, the judgment will be reversed and the attachment quashed. *Ib.*

BALTIMORE CITY.

1. The Mayor and City Council of Baltimore by their charter, have full power to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city, and within three miles of the same. *Harrison vs. M. & C. C. of Balt.* 202.
2. That Act clothed the corporate authorities within the specified limits, with all the legislative power which the General Assembly could have exerted, and of the degree of necessity for such municipal legislation, the M. and C. C. of B. were the exclusive judges; the means and manner contributory to the end in view, were committed to their sound discretion. *Ib.*
3. The corporation might impose penalties, or cause the vessel and all persons on board to be taken possession of, and controlled until their disinfection was effected, and impose on the captain, owner or consignee, reimbursement of all expenses incurred, or they might adopt at the same time both those remedies. *Ib.*
4. In an action to recover the expenses incurred by the Mayor and City Council of Baltimore, in disinfecting and purifying a vessel, persons, and baggage, on board her at the time of her arrival, from the infection of the small-pox, the defendant cannot require the Court to instruct the jury, that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small-pox. By such an instruction the rights of the plaintiff would have been unreasonably and illegally restricted. *Ib.*
5. If the health officer of the city, on whom the duty of disinfection is imposed by the ordinances of the corporation, in causing expenses to be incurred, acted *bona fide* within the limits of a sound discretion and with reasonable skill and judgment in this discharge of his official duties, the reasonable expenses thus incurred by him, must be paid by the captain, owner or consignee of the disin-

BALTIMORE CITY.—*Continued.*

- fectured vessel as declared by the ordinances of the city on such subjects. *Ib.*
6. The health officer in his disposition of persons on board of an infected ship, under the ordinances of the city, must send the persons laboring under the infectious disease to the hospital, and may also send those on board the same vessel, liable to be affected by it, to the hospital, if in his opinion such course be necessary to prevent the spread of the disease. *Ib.*
 7. And that officer, acting with reasonable skill and judgment, and with a sound and honest discretion in relation to persons not apparently afflicted with the disease, renders the owner, master or consignee, also liable for the reasonable expenses incurred as in other cases. *Ib.*

BANKRUPTCY AND INSOLVENCY.

1. A release under the insolvent laws pleaded and relied upon as a defence in bar of the action, and upon an issue joined on a denial of the truth of the plea, when offered in evidence, is said to come incidentally in question. *Bowie vs. Jones*, 159.
2. The jurisdiction of the County Courts in relation to insolvent debtors is limited, but in support of a release under the Acts relating to them, all that is necessary to be shown, is that the case made by the record of the release is within the limited jurisdiction, and then the judgment would be just as obligatory and conclusive as if the judgment were one of a Court of general jurisdiction. *Ib.*
3. The release of an insolvent debtor is an exception to the principle, that where the course of procedure is pointed out by statute, the proceedings must show their conformity with the Act by which they are authorized. *Ib.*
4. Under the Act of 1805, ch. 110, the presentation of a petition by a party in confinement was alone necessary to give jurisdiction, and since the proof of confinement has been dispensed with by the Act of 1830, ch. 130, the jurisdiction of the County Court attaches by the presentation of a petition such as is prescribed by the Acts in relation to insolvent debtors. *Ib.*
5. A single Judge is empowered to act upon the petition of an insolvent debtor, in the recess of the County Court, and hence the application for relief made in conformity to the statutes is depending in point of law, from the time of its presentation to the Judge, though not filed with the clerk of the Court. *Ib.*
6. Either the County Court, or a Judge thereof in the recess of the Court, may grant a personal discharge, appoint a trustee, and take a bond. *Ib.*
7. Where the release of an insolvent debtor comes incidentally in question, it cannot be avoided upon the ground, that the insolvent had a prior application depending at the time of the one under which he obtained his final discharge. *Ib.*
8. Where the County Court maintained the invalidity of an insolvent debtor's release relied upon in bar of the plaintiff's action, and the jury found accordingly, and also, that the insolvent since his release had obtained goods, &c. by descent, &c. in his own right; this Court disagreeing with the County Court and holding the release valid,

BANKRUPTCY AND INSOLVENCY.—*Continued.*

will award a *procedendo* to try the question of subsequent acquisition by the debtor within the exceptions of the Act of 1805, ch. 110. *Ib.*

9. To vacate a deed by the insolvent laws existing anterior to the Act of 1834, ch. 283, the grantors, at the time of executing the deed, must have contemplated taking the benefit of the insolvent laws; otherwise, the deed could not therefore be condemned as made with a view or under an expectation of being and becoming an insolvent debtor, and with intent thereby of giving an undue and improper preference. *Cole vs. Albers*, 314.
10. A deed made at the request of the creditor, prior to the Act of 1834, was not within the meaning of our insolvent laws. *Ib.*
11. The Act of 1834, ch. 293, so far as it authorizes the Courts to vacate conveyances made in contemplation of insolvency, is a local law confined to the City and County of Baltimore, and does not apply to cases where the grantee had not notice of the insolvent condition of the grantor. *Ib.*
12. Where, after the execution of a deed of mortgage, the mortgagor lent money and sold goods to the mortgagee, and took notes for the payment of his debt, in semi-monthly instalments, this is evidence that he did not know his debtor to be in an insolvent condition. *Ib.*
13. The notice required by the Act of 1834, to vitiate a conveyance is not a technical or constructive notice, but an actual notice derived from a knowledge of the condition of the grantor of such conveyance. *Ib.*

BILL OF EXCEPTIONS.

Where a bill of exceptions is sealed, the truth of the facts contained in it, can never afterwards be disputed. *Mitchell vs. Mitchell*, 50.

BILLS OF EXCHANGE.

1. Where the holder of a bill of exchange, in Baltimore, sends it to a distant place, as Charleston, S. C. for acceptance, and it is not accepted, the plaintiff, in an action against an endorser, must show presentment for acceptance and refusal, and notice duly transmitted from Charleston to the endorser by mail, or if the notice to the endorser was sent by mail to the holder in Baltimore, that he delivered it within one day after the arrival of such notice in Baltimore, and the burthen of proof is on the plaintiff to show such notice given. *Whiteford vs. Burckmyer*, 96.
2. Courts of justice will never enquire in such cases, whether a plaintiff sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. *Ib.*
3. Blank endorsements may be filled up at the moment of trial. *Ib.*
4. If a bill has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee. *Ib.*
5. A bill payable to bearer, or a bill payable to order endorsed in blank, will pass by delivery and bare possession, is *prima facie* evidence of title. *Ib.*
6. If an agent receive a bill with all the endorsements in full, and the last in full to his principal, the agent cannot sue in his own name, or if the endorsements are in blank, and he were to fill it up to himself or his principal, it could not be sued on in the name of a stranger. *Ib.*

BILLS OF EXCHANGE.—*Continued.*

7. Since the Act of 1825, ch. 35, any holder with a blank endorsement may now sue in his own name, but that Act cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner. *Ib.*
8. Where the entire and exclusive interest in a bill is vested in the holder thereof, he cannot institute an action upon it in the name of another party. *Ib.*
9. Possession of a note endorsed in blank will enable the party having it to maintain suit, except *mala fides* be proved. *Ib.*
10. An admission of notice by a defendant endorser is evidence, on which the jury may find notice, in due time, and in due form. *Ib.*
11. An action will lie upon notice of presentment, and non-acceptance of a bill of exchange, without waiting for demand of payment at the maturity of the bill. *Ib.*
12. The holder is not bound to present a bill payable on a certain day after date, for acceptance, unless he be an agent to get it accepted or to collect it. If it be presented, and acceptance is refused, it is dishonored, and immediate notice must be given to the parties who are to be charged. *Ib.*
13. It is not necessary that notice of protest be sent by mail, and a party is not bound to be more expeditious or certain than the mail. *Ib.*
14. Notice, if sent by mail, need not be enclosed to the address of the party to be charged. If it be received by him in due time, he cannot object to the mode of conveyance. *Ib.*

See EVIDENCE, 23, 25.

WAIVER.

BOND.

1. Where the assigned breaches are not sufficiently specific, after issue joined upon them the defendant may claim a bill of particulars, to enable him to prepare his defence. *Baden vs. State*, 127.
2. A bond of conveyance which recites that the obligor did sell to the obligee, and contract and agree to grant and convey to him, his heirs and assigns, a certain tract of land, acknowledging the receipt of the cash part of the purchase money from him, with the notes of the obligee, and another for the balance thereof, and stipulating until default should be made in the payment of the purchase money, that he should hold the land sold as aforesaid, demonstrates that the obligee made the purchase on his own account, and parole evidence is not admissible to contradict it in that respect. *Savage Mfg Co. vs. Worthington*, 218.

See EVIDENCE, 30.

TAX AND TAX COLLECTOR, 1, 5.

SURETY, 3.

CANAL.

1. The Chesapeake and Ohio Canal Company has no right in cutting its canal across public highways, utterly to destroy them, and it is bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under its canal. *Leopard vs. C. & O. Canal Co.* 169.
2. A deed from a party seized of land, conveying to the C. & O. Canal Company "such portion and quantity of his land as may be cov-

CANAL.—*Continued.*

ered, used or occupied by the said canal, or the necessary works thereof," and describing the premises conveyed, is not a contract to surrender the privilege of using public highways which passed through the granted premises. *Ib.*

3. In construing a deed made to a canal company for the purposes of its works, the Court will presume that the parties to it understood their relative rights, powers, and duties, in respect to the subject-matter of their contract. *Ib.*

COMMISSIONERS TO TAKE TESTIMONY.

1. In the absence of all proof to the contrary, judicial courtesy requires this Court to presume, that the County Court discharged its duty according to the rules and practice of such Court, in awarding a commission to take testimony. *Calvert vs. Coze, 72.*
 2. So where the County Court assembled on the first day of the month, and proceedings were had in a cause, which resulted in the withdrawal of a juror, and on the twenty-seventh of the following month, the Court ordered a commission on the motion of the plaintiff to be issued; but it did not appear when such motion was made, nor when, nor by whom commissioners were named, it is fair to presume, either that the defendant did name and strike commissioners, or that after reasonable notice, he failed to do so. *Ib.*
 3. The motion of a suitor seeking commission to take proof, is that a commission be issued, naming the place to which he wishes it to be addressed. The Court then grants the usual order to name and strike commissioners. *Ib.*
 4. The power of selecting the time and place of executing a commission to take testimony, addressed to commissioners out of Maryland, is confided by the terms of the commission, to their sound discretion. *Ib.*
 5. A commission, addressed to commissioners of the District of Columbia, may be executed in Virginia. *Ib.*
 6. In the execution of a foreign commission, no notice to the parties of the time and place of its execution is necessary. All the notice required, is that of the interrogatories sent out with the commission. Actual or constructive notice should be given to the opposite party in time for him to exhibit cross interrogatories before the transmission of the commission. *Ib.*
 7. Five days notice given to a defendant, a resident of Maryland, of the time and place of executing a commission in Virginia, about forty miles distant from his residence, is sufficient, and it is no objection that it was executed at the private residence of the witness. *Ib.*
- See EVIDENCE, 4-6.*

CONSTITUTIONAL LAW.

See TAX COLLECTOR, 6, 7.

CONTRACT.

1. A testator devised a sum of money to his two grand-daughters, as and for their absolute property, to be taken and set apart for that purpose, out of his personal estate, and paid them as soon as conveniently may be done after his decease; the same to be understood as bequeathed unto them as their property respectively, and not to

CONTRACT.—*Continued.*

- either of their respective husbands or their father, nor their step-brothers or step-sisters. The sum devised to one of the females, was demanded by her husband from the executors, and paid over to him by them upon a special agreement. In an action brought by the legatee against the administrators of her deceased husband to recover the money received by him. *Held*, that it was not material whether the will gave her an absolute or a separate estate, and that her rights must depend upon the validity or invalidity of the agreement, in virtue of which the money was paid over to her deceased husband. *State vs. Reigart*, 1.
2. A contract founded upon an equitable duty, such as would be enforced by a Court of equity, or upon a moral obligation, which no Court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of a legal right by the party entitled to it, is maintained by a sufficient consideration. *Ib.*
 3. Where the merits of an action at law depended in every aspect of it, upon the true construction of an agreement, every prayer which went to the right of action, and kept out of view the effect of the agreement, and so did not involve the true point of controversy between the parties, is considered as wholly abstract. *Ib.*
 4. The plaintiff, upon the sale of a horse by him, promised the defendant, the purchaser, to obtain a certificate from the breeder, that the animal was thoroughbred, and send it to him. In an action to recover the amount of a note given for the purchase money, the defendant prayed the Court to instruct the jury that the plaintiff could not recover, unless the jury should find, that the horse was thoroughbred, which the Court refused, and instructed the jury that the plaintiff could not recover unless he furnished the promised certificate within a reasonable time from the making of the contract. This was affirmed upon appeal. *Mulliken vs. Boyce*, 45.
 5. Upon the sale of a horse, the seller agreed to furnish the buyer with a breeder's certificate that the horse was thoroughbred. The latter accepted the animal, and retained him without any offer to return him. In an action upon a note for the purchase money, though the plaintiff had failed to furnish the promised certificate, he may still recover the actual value of the horse sold. *Ib.*
 6. Where the parties entered into a contract, to construct a road between two given points, which from its nature was an entire indivisible contract, and afterwards entered into another agreement for the performance of the same work, either in part, or in the whole, at a different price, the latter is an extinguishment of the first contract. *Howard vs. W. & S. R. R. Co.* 238.
 7. Where an entire contract is extinguished in part or in the whole, an action on the contract itself cannot be sustained. *Ib.*
 8. Where an entire contract is extinguished in part or in whole, by the making a new one for a part of the subject-matter of the first, it is not sufficient for the plaintiff, who seeks to recover damages for a violation of the original agreement, and to repel the legal presumption of a merger in such a case, to aver that he entered into the second contract with an express understanding on his part, and so declared to the defendant at the time, that the first contract was

CONTRACT.—*Continued.*

not waived, except so far as it was covered by the second; but the fact of assent by the other party should have been also averred. *Ib.*

9. The legal presumption of a merger, as where two contracts are successively entered into upon the same subject-matter, is not to be repelled by evidence of the silence of one party, but assent of parties must be averred and proved, to prevent such presumption from operating. *Ib.*
10. Where a contract has been vacated and rendered legally inoperative in part by the consent of the plaintiff, no action can be sustained upon it for the recovery of damages on the ground, that the plaintiff was prevented by the wrongful act of the defendant from fulfilling it. *Ib.*
11. Where an original contract has been rescinded by the parties after it has been performed in part, either by a waiver of the performance of the balance of the contract, or entering into a new one so inconsistent with the first as to be wholly irreconcilable with it, in such case a recovery may be had for the performance on a general count; but not by declaring on the contract itself. *Ib.*
12. Where a contract is broken, the plaintiff will be entitled to some damages, whether they be stated or not. *Ib.*
13. Damages are implied from a breach of a contract. *Ib.*
14. Wherever damages necessarily and naturally arise from the breach complained of, and may therefore be implied, they need not be stated; otherwise they must, to prevent surprise. *Ib.*
15. Where a breach of contract is relied on, from which damages necessarily and naturally arise, the general conclusion, that the plaintiff has sustained damage in, &c. is sufficient to all the counts in the declaration, and obviates the necessity of charging damages generally in each one of them. *Ib.*

See EXECUTORS, 8.

STATUTE OF FRAUDS, 2. 5.

TAX COLLECTOR, 8.

CORPORATION.

Where by the terms of a charter a manufacturing company had no power to assume the responsibility of a surety, the note of such a company executed upon no other consideration than as surety is void. *Savage M'fg Co. vs. Worthington*, 218.

CRIMINAL LAW.

An indictment under the Act of 1817, ch. 227, section 1, should allege the names of the slave and his master if known; if unknown, the fact should be so averred; and also, that there was no license in existence authorizing the slave to remain in the retailer's store, &c. within the period prohibited by the said Act. It is not a compliance with the Act merely to allege the slave not having a written order or license from his master. The non-existence of a license is an essential ingredient in the offence. *State vs. Nutwell*, 40.

DEED.

1. A receipt for the purchase money is no necessary part of a deed, as it would, in every respect, be as valid without it, as with it. *Wolfe vs. Hauver*, 64.

DEED.—Continued.

2. Evidence cannot be admitted which would have the effect of changing the character and legal operation of a deed. *Cole vs. Albers*, 314.
3. When a deed purports to have been made on a moneyed consideration, it cannot be shown that money did not constitute the consideration; where a deed is impeached for fraud, and the consideration stated is money, it will not be allowed to set up a different consideration as marriage to support the deed. *Ib.*
4. Where the consideration stated in a mortgage is a sum of money in hand paid, and it is taken to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made, and to be made, to that extent. Such evidence would not affect the nature of the deed. It would still be founded on a money consideration. *Ib.*
5. Such evidence is also admissible to rebut the idea of fraud, by showing the same kind of consideration, differing only in amount, and the circumstances under which it assumed this shape. *Ib.*

See **BANKRUPT**, 9.

EJECTMENT.

1. A prevalent opinion, in the neighborhood of the premises claimed in an action of ejectment, even if known and adopted by the lessor of the plaintiff, as to her legal rights whether founded in error or not, does not, at law, prevent the running of the Statute of Limitations, nor repel the legal presumption of a grant arising from long continued, and acquiesced in, adverse possession. *Casey vs. Inloes*, 329.
2. A certified copy of the rent-roll, extracted from the debt books of the Lord Proprietary, under the hand and seal of the Register of the Land Office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant. It was held that the Court could not be called upon to instruct the jury that they are bound to presume a deed from the patentee or those claiming under him, to certain parties for a given tract of land; though it would have been competent to have required an instruction to the jury that they must presume a deed from the patentee, or those claiming under him, to a certain other party, from whom the paper or record title was perfect. *Ib.*
3. A continuous possession of twenty years or upwards, in a party, or those claiming under him, will authorize him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the Court to instruct the jury to presume such a conveyance. *Ib.*
4. No direct proof of possession in a given party can be reasonably expected after a lapse of one hundred and fifty years. *Ib.*
5. The certificate of the surveyor of the county, made in 1698, that a tract of land began at a bounded white oak, standing in the line of a parcel of land formerly belonging to M., "and now in the possession of the aforesaid T." returned to the land office about nine years after a deed to T. is evidence of T's possession of the land referred to as formerly belonging to M. *Ib.*

EJECTMENT.—*Continued.*

6. So proceedings in ejectment, commenced in 1704, by C. against H. the grantee of T. in which the premises sued for were described as late in the tenure and occupation of T., and the lessor of the plaintiff, recovered judgment upon title derived from H., are evidence that T. had been in possession, is confirmatory of the surveyor's certificate, and that H. was in possession at the institution of the suit. *Ib.*
7. A recital in a deed, dated in 1756, professing to be made by the son and heir-at-law of one joint tenant, conveying land to the surviving joint tenant, and declaring that he "now continues as survivor, seized, and yet is actually seized of such lands," is evidence in 1848, that such survivor was possessed at the date of the deed. *Ib.*
8. Where a plaintiff in ejectment deduces a regular paper title from two grantors, the possession of either, the other necessary circumstances concurring, will enable him to ask the presumption of a conveyance to the party in possession. *Ib.*
9. It is not universally true that possession of land is a matter of fact which must be proved by the same kind of testimony requisite for the proof of any other fact or occurrence. *Ib.*
10. Possessions of modern date, susceptible of proof by living witnesses, may be within the general rule; but as to those of such antiquity, that the brevity of human life demonstrates that such proof cannot be had, these are not within the rule. *Ib.*
11. Certificates of public surveyors, entries in debt books, recitals in deeds of ancient date, are evidence to prove ancient possession of lands. *Ib.*
12. Facts of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, may be established by hearsay evidence. Where it was *Held*—
 - 1st. That the patentee of certain land, and those claiming under him, had by virtue of the Act of 1745, ch. 9, sec. 10, a mere privilege of acquiring property by its reclamation from the water; that until reclaimed, she had no property; no possession; no right, under that Act.
 - 2nd. That a party, by erecting a fence for thirty years and upwards, on a part of the low grounds adjacent to such tract designated as the cove, in front of that part of M's Neck claimed by the plaintiff, which was covered by the flow of the tide, and claiming below it, did not furnish evidence of such an uninterrupted continuous possession, as was essential to the presumption of a grant to the person making and extending such fence.
 - 3rd. That being erected on navigable water, without the limits of the land owned by the patentee, it gave him no right of action.
 - 4th. That ejectment would not lie, there being no title in the land.
 - 5th. That trespass, in which the law implies an injury, whether sustained or not, could not be maintained for want of ownership in the soil.
 - 6th. A party in possession of land adjacent to a navigable stream, who runs a fence from his land into the stream, across the front of another adjacent proprietor, gains no possession by such an act, which is in itself a trespass. *Ib.*

EJECTMENT.—*Continued.*

13. Where defence is taken on warrant of resurvey, all possessions whether relied on to prove title, for illustration, or to disqualify witnesses examined on the survey, must be located on the plots of the cause. *Ib.*
14. Where several defendants, in an action of ejectment, claim title to several and distinct parcels of the land sued for, as by separate and independent leases, and there is no evidence to show any possession in any person under whom two or more of the defendants claim to derive title, a presumption of a grant, founded on the possession of the claimant of one lot, cannot enure to the benefit of the claimant of a separate and distinct lot, of which no such possession had ever been held. *Ib.*
15. The Court cannot be called upon to say that an original patent must be construed by reference to its relation to another patent, founded on a resurvey of the same land, where the second patent did not appear in evidence, and where the same parties claimed under both patents. *Ib.*
16. M. was patented in 1663. In 1784, J. including a part of M. was also patented, and in 1787 an escheat warrant and patent issued for M. The two last patents were granted to F. under whose devise, the plaintiff claimed M. by his deed of 1758. *Held*, that the conveyance passed M. as it was held under the original patent of 1663, be the effect of the patent of J. what it may. *Ib.*
17. A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation. If encroached on, the grantee may maintain trespass or ejectment. *Ib.*
18. The Act of 1745, ch. 9, never was designed to give one land holder the power of extending his improvements over the land of another. *Ib.*

See ESTOPPEL.

ESTOPPEL.

1. A plaintiff in ejectment, who claims title under two grantors, is not estopped from setting up the paramount title of the one, or alleging that he derived no title from the other. *Casey vs. Inloes*, 329.
2. The true principle of estoppel, as applicable to deeds, is to prevent circuitry of action, and to compel parties to fulfil their contracts; thus, a party in a deed asserting a particular fact, and thereby inducing another to contract with him, cannot, by a denial of that fact, compel the other party to seek redress, against his bad faith, by suit; but the Court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation; and this they will do, not on the ground of concluding the parties from showing the truth, but because the whole truth being shewn, the justice of the case is not changed. *Ib.*
3. The doctrine of estoppel does not apply to grants made by the State. They only pass the title which the State had at the time of the grant, and not that subsequently acquired. *Ib.*

EQUITY.

1. After a sale of a tract of land, the vendor, in consideration of natural love and affection, under his hand and seal assigned the unpaid purchase money to one of his grand-daughters, and then devised the land to his four grand-daughters, including his grantee, "to be equally divided among them." Upon a bill filed by the grantee of the purchase money against the vendee, the executors of the vendor and her co-devisees, the latter agreed to a division of the balance of the purchase money among themselves, and to unite in a conveyance upon its payment, but one of the executors excepted to the averments of the bill under the Act of 1832, ch. 302, on the ground that it did not charge him with the receipt of purchase money. *Held*, that the sufficiency of the bill upon the appeal of that executor as against him, was open to the consideration of this Court. *Berry vs. Pierson*, 179.
2. Where a bill is properly excepted to upon the ground of the insufficiency of its averments to charge a party proceeded against, whatever may be the proof, no decree can be pronounced against him. *Ib.*
3. Proper and sufficient allegations in a bill are necessary to prevent surprise and consequent injustice. *Ib.*
4. Where a defendant consents to the ratification of an audit which charges him with a sum of money, this is sufficient evidence of its receipt by him. *Ib.*
5. Where a bill gives a defendant no intimation that any claim would be made against him, but the demand appears in the proof, he may by way of exception to the auditor's report, rely upon the Act of Limitations, and it is no objection that it was not taken in the answer. *Ib.*
6. The defence of limitations may be taken in equity as soon as by the proceedings, the party has notice that any claim was to be made against him. *Ib.*
7. A party who receives money as a *quasi* trustee, as for the use of those to whom it belonged, not as acting under a continuing or express trust; whose duty it is to pay over immediately on its receipt, is liable to an action at law, and the Act of Limitations begins to run from the time of the receipt. *Ib.*
8. Where limitations are relied on in equity, and the Court therefore deem it fruitless to proceed with the cause, though the claim could in other respects be maintained by an amendment of the pleadings, it will not be remanded. *Ib.*
9. Where the Court perceives from the mutual allegations of the parties, and from the evidence adduced in the cause, that they had stated and settled an account between themselves, they cannot claim a decree to account. *Stiles vs. Brown*, 267.
10. A complainant seeking to investigate ancient accounts, will have his case subjected to severe scrutiny; although he is not to be visited with all the consequences of laches; while on the other hand, the defendant's evidence may receive a more indulgent consideration. The time at which the claim is advanced, and a failure to prosecute it against original parties, while they were alive, are circumstances calculated to create suspicion against such a claim.

EQUITY.—Continued.

- and in a doubtful case strengthen the defences which the representatives of such original parties may set up. *Ib.*
11. Where the parties settle and adjust their mutual claims, and one gives the other a note for the balance due, this forecloses an enquiry into all antecedent transactions, unless upon the ground of error or fraud. *Ib.*
 12. Parties who take possession of the personal property of infants, and retain and use the same, will be considered in equity as those who enter upon and use their real estate, treated as guardians, and liable to account accordingly. *Chaney vs. Smallwood*, 280.
 13. Where a father died, having in his possession slaves belonging to his children, his widow, as his administratrix, took possession of them, held and claimed them as her own; while the children were minors, she married again, and the retention and use of the property was continued by the second husband and wife, until her death, and by him until the time of the decree. *Held*, that in equity he is only responsible for the conversions and hires accruing after the time of his marriage with the administratrix. *Ib.*
 14. The principle, that where one stands by and sees another laying out money upon property, to which he has himself some claim or title, and does not give notice of it, he cannot afterwards in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties, but the principle applies only against one, who claims under some trust, lien or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice. *Casey vs. Inloes*, 329.

See APPEAL AND ERROR, 3.

ESCHEAT.

1. An escheat grant is *prima facie* evidence of title, and is available for that purpose until the contrary is proved. *Lee vs. Hoyer*, 144.
2. It is not necessary nor usual, according to the practice of the land office, to state on the face of an escheat patent whose lands were escheated, or the facts or circumstances which show that the lands were escheatable. *Ib.*
3. A patent which professed to grant, as escheat, several parcels of land which it described, with contiguous vacancy, cannot include, as such vacancy, another parcel of land which appeared to have been theretofore granted by the State, and not enumerated as one of the parcels escheated. *Ib.*
4. Upon an escheat the State takes as the *ultimus hæres* of that, to which, the person was entitled, whose death, without heirs, created the escheat. *Casey vs. Inloes*, 329.
5. An escheat grant, in one sense of the term, is the creation of a *feudum novum*; the grantee takes the property granted as a new fief or feud, so far as regards his relationship, obligations, and duties to the State, and the estate, upon the terms specified in the grant. *Ib.*
6. But the limits, privileges, appurtenances, and priorities of the estate granted by escheat patent, and the liens and incumbrances to which

ESCHEAT.—*Continued.*

it may be subjected, exist independently of the inquiry, whether the grant be of an ancient or a new feud. *Ib.*

7. The State acquires by escheat, not only that which was originally granted, but all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person who died seized without heirs. *Ib.*
8. The escheat grantee, upon the terms specified in his grant, takes the estate granted in the same condition in which it may have devolved on the State, except so far as it may be affected by the doctrine of merger or extinguishment. *Ib.*
9. An escheat grant relates to the original grant, and passes to the escheat grantee all that passed to the original grantee, and which was held by him, whose death, without heirs, occasioned the escheat. *Ib.*
10. The relation of the escheat grant to the original grant is not intercepted by an intermediate patent, unless, at the time of granting the same, the escheat right had accrued. *Ib.*
11. Until the occurrence of the event which constitutes the escheat, the interest of the Lord Proprietary in relation to it, was a mere possibility, and could not be the subject of a grant. *Ib.*

See LAND OFFICE, 8.

EVIDENCE.

1. A promise by the vendor of a horse to furnish a breeder's certificate that the animal was thoroughbred, does not authorize the defendant in an action against him for the purchase money, to introduce the opinion of a witness who had seen its pedigree as forwarded by the plaintiff to the defendant, that he did not consider it thoroughbred, as evidence to the jury, without producing the paper which contained it. *Mulliken vs. Boyce*, 45.
2. A witness is not competent to speak of the contents of a paper-writing or document without producing it. *Ib.*
3. Where a defendant lived with the witness, and kept papers at his house, and had also a plantation and house to which he frequently went, and where the witness had seen papers which he supposes belonged to the defendant, an unsuccessful search for a paper alleged to be left at the house of the witness, and no search anywhere else, is not sufficient to let in secondary evidence of the contents of the paper as a lost paper. *Ib.*
4. The Act of 1828, ch. 165, which authorizes the taking of testimony in civil cases, before commissioners to be appointed by the County Courts, manifestly contemplates a case where both the plaintiff and defendant are in existence and actually parties to the litigation upon the record at the time the notice is given by the commissioners, and the deposition taken in pursuance thereof. *Mitchell vs. Mitchell*, 50.
5. So where a defendant is dead, and no new party having been made, a deposition taken is without authority under that Act. *Ib.*
6. Where commissioners are appointed under an Act of Assembly by the Courts to take proof between parties, no rule of Court can transfer powers to the commissioners, designed by the Act to be exercised by the Courts or the Judges thereof. *Ib.*

EVIDENCE.—*Continued.*

7. The receipt in a deed for the conveyance of land is only *prima facie* evidence of the payment of the purchase money. *Wolfe vs. Hauver*, 64.
8. It is a familiar principle that receipts acknowledging the payment of money may be explained or contradicted. This constitutes an exception to the general rule giving a conclusive effect to written evidence; an exception introduced for general security and convenience, and to protect mankind from fraud. *Ib.*
9. Though a party cannot discredit his own testimony, yet he may show that his witness is mistaken; and is not precluded from showing the truth by any testimony, oral or written, which he may produce. *Ib.*
10. Where the only question presented for the consideration of the Court below, was the admissibility of the parol evidence offered, this Court will not, since the Act of 1825, ch. 117, entertain the enquiry, whether the particular action brought will lie for want of written evidence as required by the Statute of Frauds. *Ib.*
11. Where the bill of exceptions does not assert that the evidence offered, was all which was adduced by the plaintiff, this Court will not assume that it contained all that was produced, for the purpose of raising a question, not presented by the record. *Ib.*
12. Where a witness proved the admission of a debt by the defendant in a conversation with him, he cannot, in reply to the question of why he called on the defendant, be permitted to testify to information which he had received from other persons strangers to the action; though it constituted the inducement to call on the defendant, it was hearsay. *Ib.*
13. It is the duty of parties where they design to introduce hearsay evidence for the purpose of impeaching a witness, to apprise the Court of such design. *Ib.*
14. It is incompetent to introduce illegal testimony, and then impeach the witness, by disproving the facts thus illegally established. *Ib.*
15. A witness cannot be permitted to state the contents or effect and operation of a written instrument without producing it. *Calvert vs. Coxe*, 72.
16. Facts proved on a former trial by a deceased witness, are admissible on a second trial of the same case. They could only be rejected on the presumption, that facts were proven on the first trial, which were inadmissible as evidence, which is not to be intended. The reasonable presumption is, that such facts were alone proved as were admissible. The Court should act on this presumption upon the offer of proof of the deceased witness' testimony, until the contrary appeared. *Ib.*
17. In an action by an attorney for compensation for professional services upon a *quantum meruit*, it is not competent for the plaintiff to offer evidence as to what sum was paid to, or demanded by, any attorney in particular, for like services. The usual and customary compensation for services of the like kind, is admissible evidence; but what was paid to any particular individual, standing *per se*, is inadmissible. *Per Prince George's County Court*—affirmed by a division of this Court. *Ib.*

EVIDENCE.—*Continued.*

18. It is a sound rule that before a party can discredit a witness by proof of his having made statements at variance with his testimony, the witness whom it is intended to impeach, should first be afforded a full and fair opportunity to recollect, by calling his attention to dates, names, or other attendant circumstances, as connected with the matter about which he is to be charged with having made different statements: but in the matter of the testimony which it is proposed to contradict, or in the manner of arriving at it, a party will not be allowed to violate any positive rule of evidence. *Whiteford vs. Burckmyer*. 96.
19. It is not permitted to ask a witness any fact which fancy or idle curiosity may suggest for the purpose of disproving it by another witness; nor is it proper to ask a witness, with the same view, of a fact proper in itself to be proved in the cause, if the only knowledge of such fact has been obtained through a source which the rules of evidence, do not recognize as competent. *Ib.*
20. It is a rule of evidence, subject to very few and well defined exceptions, that a party cannot offer in evidence his own declarations in relation to the subject in controversy. *Ib.*
21. Where a question proposed to be asked of a witness involves several distinct members, the Court is not bound to select from it such members as might be admissible, if unaccompanied by the others with which it is connected, and say that such particular portions of the testimony are proper. *Ib.*
22. A letter written by the plaintiffs in the cause to a third party, unaccompanied with other proof, is like their verbal declarations to him; and where it was intended to establish that the letter contained a certain enclosure, the party to whom it was addressed, and who received it, being a competent witness, is the best evidence to establish the fact. *Ib.*
23. In an action by an endorsee against the endorser of a bill of exchange, the drawer is a competent witness to prove that he had received notice of non-acceptance, and his declarations to a third person are not therefore the best evidence of that fact. *Ib.*
24. Where an agency is established, it is generally true, that an admission of an agent while in the execution of his agency, is admissible to charge his principal. *Ib.*
25. The necessity for plain and satisfactory proof as to the time of service of notice of non-acceptance, where that is material, has always been insisted on; it may be proved by circumstantial testimony, but the circumstances must point not to notice at some time, but to notice on the day when the party had a right to expect and receive it. *Ib.*
26. Where several witnesses are examined, the testimony of any one of them may be selected from the mass of proof with which it is connected, and made the subject of an instruction. *Ib.*
27. Where the protest does not show notice of dishonor transmitted to the party to be charged, that fact may be supplied by other proof. *Ib.*
28. The rule which excludes hearsay evidence is as obligatory in repelling and discrediting testimony, as in conformatory. *Ib.*

EVIDENCE.—*Continued.*

29. The declarations of a person who is a competent witness cannot be offered in evidence merely because they are in reply to the testimony of other witnesses. *Ib.*
30. The single bill of a collector of the county, sealed as collector, promising to pay the equitable plaintiff in the action, a sum of money "for value received, with interest, the same being for county paper due for the year 1836-7." *Held:* to be sufficient evidence in the absence of contradictory proof, to entitle the plaintiff to a verdict upon the bond of the collector, as well against the principal as his securities. *Baden vs. State*, 127.
31. Such a bill, is an implied admission, that the obligor had collected and received the amount therein mentioned; that the same had been levied, and the levies transferred to the obligee. *Ib.*
32. After verdict, upon motion in arrest, the Court will presume that sufficient proof was offered to the jury, to enable them to find all the allegations in the pleadings, substantially necessary to support the claim of the plaintiff. *Ib.*
33. A party in a cause cannot prove by a solicitor in Chancery, that in the opinion of such solicitor, judging by an examination of certain proceedings in that Court to vacate conveyances, (without producing the record,) that he had used reasonable diligence to accomplish the object of such proceedings. *Duvall vs. Peach*, 132.
34. Parol proof of facts of which the plaintiff had record evidence cannot be given: it is not the best evidence in legal contemplation. *Ib.*
35. An instrument of writing in the following words, viz: "we hereby bind ourselves to pay W. all that we receive over \$400 of the C. and O. C. Company in our cases against said L. and M." signed by the defendant, does not *per se* contain evidence of a consideration. *Keefer vs. Mattingly*, 139.
36. But the connexion of this paper with other proof leading to the inference, that the plaintiff in the action had forborne to defend certain actions depending at the time of its execution, and in consequence of, and reliance upon it, allowed judgments to be rendered, is sufficient evidence of a consideration for its execution, proper to be left to the jury. *Ib.*
37. L. assigned to M. his claim against the C. and O. C. Company. At this time K. had an attachment pending against the funds of L. in the hands of the company, and shortly afterwards agreed to pay M. all sums he should receive over and above the sum of, &c. In an action by M. against K. to recover such surplus, the assignment from L. to M. is admissible evidence, as a basis for the introduction of the agreement between M. and K. and calculated to explain the reasons for that agreement. *Ib.*
38. The Court will not instruct the jury after a lapse of seventeen years merely, to presume the death of the patentee of land. *Lee vs. Hoye*, 144.
39. A partial possession of land, with a general claim of title for fifteen years, will not authorize the presumption of a conveyance to such claimant. *Ib.*
40. Before the Court can grant an instruction that a plaintiff is not entitled to recover, it must assume the truth of all the testimony given

EVIDENCE.—*Continued.*

to the jury tending to sustain his right to recover, and of all inferences of fact fairly deducible therefrom. *Leopard vs. C. & O. Canal Co.*, 169.

41. Parol evidence is inadmissible to prove that a grant made to one person was intended to be made to another. *Savage Mfg Co. vs. Worthington*, 218.

See APPEAL AND ERROR; 3.

BILL OF EXCHANGE, 1, 5, 10.

BOND, 2.

DEED, 2, 5.

ESCHEAT, 1.

EXECUTORS, 4, 6.

LAW AND FACT, 9.

CONTRACT, 9.

EQUITY, 4.

NOTARY PUBLIC, 3.

TAX, 3.

STATUTE OF FRAUDS, 2, 5.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator may retain the amount of a debt due him by his deceased testator or intestate, out of his estate, or its due proportion, of assets, without passing his claim before the Orphans' Court. *State vs. Reigart*, 1.
2. The Act of Limitations does not apply to the claim of an executor against his testator, who retained for his debt. He could institute no suit at law against himself. *Ib.*
3. An executor may interpose to protect the wife's equity in property under his control. *Ib.*
4. A release to an administrator and his sureties may be legally recorded in the Orphans' Court of the county where letters of administration were granted, and a copy certified by the Register of Wills of the same county is competent evidence. *Mitchell vs. Mitchell*, 50.
5. An administrator in his settlement with a distributee may assign the choses in action of his intestate by parol. *Ib.*
6. The Register of Wills is authorized and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence. *Ib.*
7. Where letters of administration were granted in 1830, and an order of Court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, it was held in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged. *Ib.*
8. A defendant who places his defence upon the finding by the jury, "that the compensation claimed by the plaintiff of the defendant, was, according to the agreement of the parties, to be paid out of the estate of C. in the hands of the defendant's testator," cannot ask the Court to instruct the jury, that his testator was not personally liable, though the compensation had not been paid. The failure to pay out of C's estate was a breach of the contract, for which the testator was personally liable. *Calvert vs. Coxe*, 72.

EXECUTORS AND ADMINISTRATORS.—Continued.

9. One who is executor, and as legatee claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund, that full and complete justice may be administered to all the persons interested in its distribution. *Berry vs. Pierson*, 179.
10. After a period of near fifteen years, in the absence of all proof to the contrary, the Orphans' Court, in reviewing the proceedings of an executor, should assume the payment of all debts and legacies. This presumption rests on the duty of the executor, and his due discharge of it. *Gardner vs. Simmes*, 324.
11. As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate. What would be regarded such a period, might depend on the peculiar circumstances of each case. *Ib.*
12. The Acts of 1798, ch. 101, and 1820, ch. 161, confer jurisdiction on the Orphans' Court to coerce the delivery over of property, or *choses in action*, or payment of money, by the representative of the executor or administrator to the administrator *d. b. n.* of the first deceased, only in case the property, *choses in action* or money, belonged specifically to the deceased while alive, and remained in the hands of the executor and administrator as such, and not as legatee; or in case the *chose in action*, &c. was received by the executor or administrator in that capacity, and was so retained until his death. *Ib.*

See APPEAL AND ERROR, 12.

ORPHANS' COURT, 4, 5.

STATUTES, 1, 2.

FEES.

The common law of England, in relation to fees of counsellors at law is inapplicable to the State of Maryland. In a *quantum meruit*, they may recover for professional services rendered. *Calvert vs. Coxe*, 72.

GUARDIAN AND WARD.

See EQUITY, 12, 13.

HUSBAND AND WIFE.

The executors in this case held the wife's legacy as trustees; and whenever it is necessary for a husband to resort to a Court of equity to get possession of his wife's legacy, that Court will require him to do equity by making a settlement upon his wife and children, before it will lend him its aid in the recovery of it; and a promise by the husband to the executors to do that which equity would do in this case, is founded upon a sufficient consideration. *State vs. Reigart*, 1.

See CONTRACT, 1.

EXECUTORS, 3.

WILLS, 7-11.

INFANT.

See EQUITY, 12.

JUDGMENT.

1. Where a verdict is rendered for the plaintiff on two counts in a declaration, one of which contains no cause of action, the Court

JUDGMENT.—*Continued.*

will render judgment upon the other if legally sufficient. *Gordon vs. Downey*, 80.

2. Where the jurisdiction of a Court once attaches, and the Court proceeds to final judgment, the same judgment, coming incidentally in question, is to be respected. *Bowie vs. Jones*, 159.

See APPEAL AND ERROR, 4.

ATTACHMENT, 8.

EVIDENCE, 82.

PROMISSORY NOTES, 2.

JURISDICTION.

1. If a plaintiff estimates his damages at a sum not exceeding fifty dollars, jurisdiction is given to a single magistrate, because the sum recovered cannot exceed the sum claimed; but where the nature of the injury is such as to justify a claim of damages to a larger amount in his declaration, the established jurisdiction of the County Court is not taken away. *O'Reilly vs. Murdoch*, 24.
2. These views are not to be considered as in any respect applicable to cases of contract, but are intended to be confined to actions for torts. *Ib.*
3. In an action against an innkeeper, for negligently taking care of the plaintiff's horse in his stable, so that he was killed, the damages claimed exceeded fifty dollars. *Held*, that the County Court had jurisdiction of the action. *Ib.*
4. Under the Act of 1885, ch. 201, the County Court has jurisdiction in an action on the case, for overflowing the plaintiff's land, by reason of obstructions suffered to remain in defendant's mill-race, where the damages laid were above one hundred dollars, though the verdict was for a less sum. *Beall vs. Black*, 155.
5. In cases of contract the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction. The language is where the debt or damages do not exceed one hundred dollars. *Ib.*
6. The Act of 1785, ch. 72. Rev. Code, Art. 66, sec. 34, contains no express ouster of the jurisdiction of the Courts of common law, and hence they have concurrent jurisdiction over the rights of lunatics with the Court of Chancery. *Tomlinson vs. Devore*, 263.
7. Where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by Act of Assembly on any tribunal, its powers to act as it has done must appear upon the face of its proceedings. *Boarman vs. Patterson*, 283.

See BANKRUPTCY, 2, 4.

JUDGMENT, 2.

JUSTICE OF THE PEACE.

See JURISDICTION.

LANDLORD AND TENANT.

1. Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease, might have been distrained for by him, and

LANDLORD AND TENANT.—*Continued.*

is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under the Act of 1836, ch. 192. *Longwell vs. Ridinger*, 43.

2. Where the landlord resorts to a distress to recover rent, he is not entitled to interest on the sum in arrear. *Ib.*
3. For rent due and payable at the landlord's death, his administrator may claim a preference to be paid out of the assets of his deceased tenant, where the claim conforms to the Act of 1836, ch. 192. *Ib.*
4. The remedy by distress for rent in arrear is not within the Act of Limitations. *Ib.*

LAND OFFICE.

1. Extracts from record books deposited in the land office, showing the name and rank of grantee, and number of the lot and acres, with a particular description of such lot as surveyed, to which an officer or soldier of the Revolution was entitled, which books purport to have been made under the authority of the Act of 1788, ch. 44, with a certificate from the register of the land office, under his seal of office, that the same have been carefully collated and compared with the original record books from which they were respectively taken and agreed therewith, are sufficient evidence to show title in the person named in such extracts, to the lot therein described. *Lee vs. Hoyer*, 144.
2. A death of a patentee will not be presumed to support a title to land, acquired in violation of the law, and rules of the land office. *Ib.*
3. Before a title can be acquired in lands liable to escheat, the rules of the land office require that two-thirds of the value of the land be paid to the State. *Ib.*
4. A warrant of re-survey should be founded upon a seizin in fee in the lands upon which the re-survey is to be made. *Ib.*

LAW AND FACT.

1. A Court is not to be called upon to settle legal principles which have no relevancy to the case before them. *State vs. Reigart*, 1.
2. Ignorance of the law cannot be made available where there is a full knowledge of all the facts. *Ib.*
3. Where the proof is wholly oral, of the credit due to which the jury only are competent to decide, the Court should not decide the matter of facts, and so withdraw from the jury the credibility of the witnesses and the truth of their statements. *Calvert vs. Cox*, 72.
4. It is the privilege of a party to raise any question of law arising out of the facts of the case, and to demand the opinion of the Court distinctly upon it. *Whiteford vs. Burckmyer*, 96.
5. If the opposite party believes that other facts not embraced in the hypothesis assumed, are properly calculated to justify an application for other and different instructions, he has the equal privilege of asking an opinion on the additional facts, but not the privilege of controlling and modifying the hypothesis of his antagonist, nor annexing modifications to it against the consent of the party moving it. *Ib.*

LAW AND FACT.—*Continued.*

6. A party may group into one instruction as many and as complicated facts as he pleases, to assume his testimony will prove, and ask the Court to instruct the jury on the legal result of that mass of facts, but if amongst the enumerated facts there be such as it is not competent for the jury to act on, he must fail in his application. *Ib.*
7. Where the instruction given, authorized the jury to find one of three alternate and distinct propositions of fact, without saying which, it is error. It would be impossible for them to ascertain whether they were thereby authorized to find the first, second or third alternation. *Ib.*
8. If counsel present to the Court a complicated and involved statement, which it will be difficult for the jury to understand distinctly, it will be a sufficient ground upon which the Court should refuse to give a direction in the terms asked for. *Ib.*
9. It is a settled principle, that the Court will not instruct the jury that there is no evidence of a material fact, if there be any evidence whatever tending to prove it. *Ib.*
10. Where the language of an instruction is calculated to bias the mind of the jury upon a contested matter of fact, it is error. *Ib.*
11. The Court is the proper tribunal to construe and determine the legal effect and construction of instruments of writing; but where deductions are to be drawn from the conduct of parties in the execution of such instruments, at the time, in the manner, and under the circumstances existing in the case, the jury are the proper forum to make such deductions. *Keefer vs. Mattingly*, 139.
12. The Court can not take from the jury the right of finding the truth of the facts of which evidence has been offered. *Conolly vs. Kettlewell*, 199.
13. It is the province of the jury to decide all questions of fact of which evidence legally sufficient for that purpose is laid before them, and it is equally the right and duty of the Court to decide all questions of law arising upon the facts, when found and ascertained by the jury. *Ib.*
14. Where testimony has been offered, legally sufficient to warrant the jury in finding certain facts enumerated in the plaintiff's prayer, which gave him a right of action, he may upon the hypothesis, that the jury believe the evidence in the cause, and the facts enumerated, require the Court to instruct them that he is entitled to recover to the extent of such right. *Harrison vs. M. & C. C. of Balt.* 202.
15. Where the County Court undertakes of its own motion to add a qualification to a prayer granted at the request of a party, the qualification must be consistent with the original prayer, and not leave it doubtful or difficult to determinate what was the scope or design of the entire instruction. *Ib.*
16. The presumption of a grant is an inference of law arising out of particular facts, and may exist, although the jury, in their consciences, may disbelieve the actual execution of any such grant. *Casey vs. Inloes*, 239.

See EVIDENCE, 38.

LIMITATIONS.

1. Where, in an action to recover back the purchase money for certain land, it was held that the action was barred by limitations. *Duvall vs. Peach*, 132.
2. To remove the bar raised by the Statute of Limitations, there must be such an acknowledgment of a subsisting debt, as is equivalent to an express or implied assumpsit, or promise to pay. *Ib.*
3. After a decree to account, on a bill filed by a residuary legatee against an executor, upon a creditor filing a claim, it is competent for the residuary legatee to plead the Act of Limitations. *Bowling vs. Lamar*, 273.

See EJECTMENT, 1.

EQUITY, 5, 6, 8.

EXECUTORS AND ADMINISTRATORS, 2.

LANDLORD AND TENANT, 4.

MORTGAGE, 1.

ORPHANS' COURT, 2, 3, 4.

PLEADING, 3.

SALE, 3.

MERGER.

See CONTRACT, 8, 9.

MORTGAGE.

1. The design of the Act of 1825, ch. 50, was to prevent liens on property to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of the execution of their mortgage, of which the mortgage, by its terms, gave no notice. *Cole vs. Albers*, 314.
2. A deed executed to cover a mortgage against all future liabilities of any and every description, which the mortgagor might incur or be responsible for to the mortgagee, would be within its provisions. *Ib.*

See BANKRUPTCY, 12.

DEED, 4.

NEW TRIAL.

1. Where the County Court awards a new trial, it has power to authorize an amendment of the pleadings under the Act of 1785, ch. 80, sec. 4. *Gordon vs. Downey*, 30.
2. Where a verdict is set aside and a new trial awarded, the case, as far as amendments are concerned, stands as if no trial had been had. *Ib.*

NOTARY PUBLIC.

1. The Act of 1837, ch. 253, was designed to extend the credit which, by the courtesy of commercial nations, had been given to the certificate of a notary public. *Whiteford vs. Burckmyer*, 96.
2. The certificate of a public notary had been received as *prima facie* evidence of the presentment by him for acceptance or payment, and of his protest of the bill for non-acceptance or non-payment. *Ib.*
3. The Act of 1837, ch. 253, extends this doctrine as well to inland as to foreign bills or notes, as to notice sent or delivered in the manner stated in the protest. *Ib.*

ORPHANS' COURT.

1. Where the Orphans' Court, upon the application of a creditor of a deceased person, and the exhibition of the proof of his demand, passes a claim to be allowed, if paid by the executor or administrator, and upon appeal that order is reversed, such reversal constitutes no bar to the recovery of the same claim at law. The Orphans' Court possessed only a *prima facie* jurisdiction, and the exercise of the appellate jurisdiction did not increase its effect. *State vs. Reigart*, 1.
2. Where a legatee interposes the plea of limitations to the final passage of an administrator's account of the payment of the assets of the estate to creditors, no decree or order which the Orphans' Court might pass in the premises, would divest the Courts of law of jurisdiction over the same subject-matter; and the fact of the administrator being a creditor, claimant, does not change the nature of the case. *Bowling vs. Lamar*. 273.
3. The plea of limitations, (technically considered as such,) is not applicable to proceedings before the Orphans' Court, in relation to the claims of creditors. That Court may look to the fact of such a bar as evidence to be weighed with all other testimony, in relation to any claim, in determining its justice, and the propriety of passing or rejecting it. *Ib*.
4. The right to interpose the plea of limitations to claims against a deceased's estate, before the Orphans' Court, is vested in executors and administrators by our testamentary system. *Ib*.
5. The fact that the Orphans' Court has endorsed the claim of an administrator against his intestate's estate, to be allowed when paid, will not prevent the residuary legatee from objecting, before the same Court, to the justice of the demand, and requiring full proof of its existence prior to the ratification of the administration accounts, in which he seeks an allowance of his demand as paid. *Ib*.
6. For want of full proof when demanded, the Orphans' Court may reject any claim against a deceased's estate, after it has been passed and before payment. *Ib*.

See EXECUTORS AND ADMINISTRATORS, 10, 12.

PLEADING.

1. Certainty to a reasonable extent, is an essential attribute of all pleadings, both civil and criminal, but is more especially so in the latter, where conviction is followed by penal consequences. *State vs. Nutwell*, 40.
2. A declaration that the defendant is indebted in the sum of, &c., for land called, &c., containing, &c., before that time bargained and sold, delivered and conveyed, by deed bearing date, &c., by the plaintiff to the defendant, and being so indebted, in consideration thereof, undertook and promised, &c., is sufficient to maintain a demand for unpaid purchase money. *Wolfe vs. Hauver*, 64.
3. The plea of limitations is classed among those not deemed meritorious, and in relation to the reception of which, Courts of justice act with care and strictness, and must be filed by the rule day. *Nelson vs. Bond*, 166.
4. A general continuance of a cause does not enlarge the time to file the plea of limitations. *Ib*.

PLEADING.—*Continued.*

5. A prayer to instruct the jury upon the foregoing evidence, that "the plaintiff is not in, the face of his said deed, entitled to recover for any damage done his mills by reason of the construction of the canal across said public road, and the destruction of said public road." involves no question upon the pleadings in the cause—nor whether the facts proved sustain the allegations in the declaration: it concedes the sufficiency of the pleadings, and only seeks a decision on the isolated question of the legal effect of the deed referred to, and that thereby the testimony given in the cause showed no cause of action. *Leopard vs. C. & O. Canal Co.*, 169.
6. The question raised by this prayer bears no resemblance to the inquiries the Court is called upon to make, where objection is raised to the admissibility of evidence offered generally, in a trial before a jury. In such case the attention of the Court is necessarily called to the pleadings, the admissibility of the evidence being entirely dependent on them. *Ib.*
7. A demurrer is a direct attack on the pleadings themselves, whereon the Court must of necessity inspect all the pleadings in the case, as well to enable it to ascertain the sufficiency of the particular pleading demurred to, as in giving its judgment thereon to mount up to the first material error in pleading. *Ib.*
8. It is a rule in pleading, that each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse. *Howard vs. W. & S. R. R. Co.* 238.

See **BANKRUPTCY**, 2, 3.

CONTRACT, 8, 11, 12, 14, 15.

EQUITY, 2.

PRINCIPAL AND AGENT.

1. Z. sold to W. a tract of land, gave him a bond of conveyance, and received his promissory note signed by him, first in his own name, and secondly as agent for the S. M. Company. The latter was a manufacturing institution, and required land for its operations. The note not being paid, Z. brought his action against both; the company only appeared; the declaration counted upon the note. The proof showed that the agent was the general agent of the company; had bought other land for the use of the company which it retained and paid for, and that the agent was in the habit of signing its notes as agent, which were paid by the company. *Held*, that the bond of conveyance was the only legal evidence of the nature and character of the contract, and that the purchase was made by W. on his own account; and as the company was not authorized to become surety by its charter, the note was a nullity. *Savage Mfg Co. vs. Worthington*, 218.
2. Where a note is executed by an agent before it is admissible in evidence, it is necessary to prove, not only his signature, but the authority by which it is made. *Ib.*

See **BILL OF EXCHANGE**, 6.

EVIDENCE, 24.

PROMISSORY NOTES.

1. An action against husband and wife, founded on the note of the wife, made by her while sole in Louisiana, is not barred by her release

PROMISSORY NOTES.—*Continued.*

before marriage, and after the maturity of her note, under the insolvent laws of Maryland. *Nelson vs. Bond*, 166.

2. Upon a note made in Louisiana, bearing ten per cent. interest until paid, this Court will enter judgment accordingly. *Ib.*

See PRINCIPAL AND AGENT, 1, 2.

REPLEVIN.

1. The action of replevin is appropriately applied to all cases in which the plaintiff seeks to try the title of personal property and recover its possession. *Brooke vs. Berry*, 117.
2. E. by articles under seal agreed with W. that for the consideration thereafter mentioned, he would furnish him with negroes, &c. "all which property is to remain with the said W. on the land where he now resides, for and during the term of ten years, and to pay him annually the sum of, &c. W. agreed that he would pay E. one-half of the crops made during the above time, and would superintend and look after all E's business." On the execution of the agreement, the negroes were delivered to W. and remained with him several years, when they ran away and came to the possession of E. and R. the other defendant in the writ. *Held*, that replevin was an appropriate remedy for W.; and he was not bound in order to maintain it, either to show a performance, or a readiness to perform the agreement on his part, and that the contract gave him a present and immediate right to the negroes, and to possession for ten years from its execution. *Ib.*

RIPARIAN RIGHTS.

1. The right of the riparian proprietor to extend his improvements into the water, is intercepted by a grant from the State to another person of the land covered by the water of a navigable stream, over which such proprietor might otherwise have been entitled, under the Act of 1745, to make improvements. *Casey vs. Inloes*, 329.
2. The heir of lessee for a term of years of a lot bordering on the water, under the Act of 1745, ch. 9. sec. 10, is not the riparian proprietor of such lot. *Ib.*
3. Where possession was essential to the acquisition of title to land, and title to the creation of a riparian right, any prayer founded on that right, which did not submit the fact of possession to the jury, should be rejected. *Ib.*

SALE.

1. The conveyance of land, delivery of possession in pursuance of a deed, or in other words, the execution of the contract on the part of the plaintiff, as vendor of land, raises a duty on the part of the vendee to pay the consideration money which will sustain the judgment of the Court. *Wolfe vs. Hauver*, 64.
2. The law equally implies a promise to pay for land sold and delivered, as it does in the case of the sale of goods, wares and merchandise. *Ib.*
3. Upon a judgment, execution and sale, the title to land passes, though the defendant in the judgment was a lunatic at the time of its rendition. *Tomlinson vs. Devore*, 263.
4. Courts of justice guard and maintain with jealous vigilance the titles of purchasers acquired under judicial sales. *Ib.*

STATUTE OF FRAUDS.

1. At a sale of land under execution. P. agreed with D. that if D. would purchase the land, he the said P. would invalidate certain deeds therefor, and put him in possession. *Held*: that this agreement being merely by parol, is void at law under the Statute of Frauds. *Duvall vs. Peach*, 132.
 2. It is a general rule that, if the answer to a bill denies the existence of any parol contract for the sale of lands, and insists upon the benefit of the Statute of Frauds, the case cannot be made out by parol proof, and the bar of the statute is complete; but there is an exception to this rule, resulting from a part performance of the contract, established by many decided cases. *Hall vs. Hall*, 293.
 3. The evidence of part performance of a parol contract for the sale of lands, in the delivery of possession, or payment of purchase money, need not to be in writing, where such evidence is admissible as acts of part performance, to take a case out of the Statute of Frauds. *Ib.*
 4. The Statute of Frauds was designed to exclude oral evidence of the agreement of sale; not oral evidence of the acts of part performance, or things done in execution of the agreement. *Ib.*
 5. Where a complainant relies upon acts of part performance, to take a parol agreement for the sale of lands, (denied by the answers,) out of the operation of the Statute of Frauds, it is his duty to offer full and satisfactory evidence of the terms of such agreement, and of the performance of it on his part, to entitle him to a decree for specific execution. *Ib.*
- See APPEAL AND ERROR, 10.
EVIDENCE, 10.

STATUTES.

I. CONSTRUCTION AND EFFECT.

1. Acts of Assembly made relative to the administration of justice are to be liberally construed for the attainment of that important object. *Mitchell vs. Mitchell*, 50.
2. It is the duty of Courts of justice by a just construction, to reconcile the various sections in an Act of Assembly, to prevent that clashing interference and incongruity which ought never be imputed to the Legislature, where it is practicable to avoid it. *Beall vs. Black*, 155.

II. ACTS OF ASSEMBLY.

- 1745, c. 9. *Casey vs. Inloes*, 329.
 1785, c. 72. *Tomlinson vs. Devore*, 263.
 1785, c. 80. *Gordon vs. Downey*, 30.
 1788, c. 44. *Lee vs. Hoyer*, 144.
 1795, c. 56. *Boarman vs. Patterson*, 283.
 1798, c. 101. *Gardner vs. Simmes*, 324.
 1805, c. 110. *Bowie vs. Jones*, 159.
 1810, c. *Darrington vs. Rogers*, 307.
 1817, c. 227. *State vs. Nutwell*, 40.
 1820, c. 161. *Gardner vs. Simmes*, 324.
 1825, c. 35. *Whiteford vs. Burckmeyer*, 96.
 1825, c. 50. *Cole vs. Albers*, 314.
 1825, c. 117. *Wolfe vs. Hauwer*, 64; *Leopard vs. C. & O. Canal Co.* 169.

STATUTES.—*Continued.*

- 1828, c. 165. *Mitchell vs. Mitchell*, 50.
 1829, c. 51. *Gordon vs. Downey*, 30.
 1830, c. 130. *Bowie vs. Jones*, 159.
 1830, c. 185. *Darrington vs. Rogers*, 307.
 1831, c. 281. *Waters vs. State*, 231.
 1831, c. 319. *Gordon vs. Downey*, 30.
 1832, c. 302. *Barry vs. Pierson*, 179.
 1834, c. 283. *Cole vs. Albers*, 314.
 1835, c. 201. *Beall vs. Black*, 155.
 1836, c. 192. *Longwell vs. Ridinger*, 43.
 1837, c. 253. *Whiteford vs. Burckmeyer*, 96.

SURETY.

1. The security of an administrator may, under circumstances, become a competent witness for his principal to maintain an action of law to recover money due the intestate's estate; although at one period the administrator may have been guilty of *deceit* in relation to the same claim. *Mitchell vs. Mitchell*, 50.
2. As where from lapse of time, after due notice having been given under the testamentary Act to creditors to assert their claims, they are presumed to have been satisfied and none appeared to exist, and where the sole distributee of the deceased had released both the administrator and sureties from all claims, this obviates all objection on the ground of liability on the surety for the omission of the administrator. *Ib.*
3. Where the condition of a collector's bond was that he "shall well and truly account for and pay over to the treasurer of the State, the several sums of money which he shall receive or be answerable for by law, at such time as the law shall direct," it is no change or alteration of the terms of the contract, that the Legislature appointed a more distant day, than the one fixed when the bond was executed, for the payment of the money collected into the treasury. *State vs. Carleton*, 190.
4. The granting of indulgence by law to a principal collector of the State does not discharge his sureties, though without their consent. *Ib.*
5. The Legislature, at their pleasure, and whenever the interest or convenience of the State requires it, may alter the time at which the collectors of taxes are required to pay the public dues into the treasury. *Ib.*
6. Where, on a collector's bond, the breach assigned by the State was the non-payment into the treasury of the taxes received, and the defendants pleaded general performance by the collector, and no assessment imposed by the commissioners of the county, on which pleas issues were joined, and the jury found that the defendants did not owe the State any sum, as the State hath within by its pleadings alleged. *Held*, that the verdict was defective in not finding the matters put in issue by the pleadings, and no judgment could be entered upon it. *Ib.*

See CORPORATION.

EVIDENCE.

TAX AND TAX-COLLECTOR.

1. The objection that breaches assigned upon the record, are not sufficiently specific, in stating the names of parties for whom levies were

TAX AND TAX-COLLECTOR.—*Continued.*

- made, and the amounts levied for each person, cannot avail on a motion in arrest. *Baden vs. State*. 127.
2. A party for whom a sum has been levied in the county levies, may make a valid transfer thereof without writing. *Ib.*
3. The collector of taxes is regarded as an agent of the State, and where he admits the collection of taxes, he will not be heard to urge in his defence to a suit for their recovery, that the money he had received was on account of taxes which the Legislature had no constitutional power to impose. *Waters vs. State*, 231.
4. The question of constitutional authority to levy a tax, may arise between the collector and the person taxed, before payment. or after payment between the State and such person. *Ib.*
5. By the Act of 1831, ch. 281, a board of managers was provided for, to remove free negroes and mulattoes from Maryland to Liberia. The treasurer was directed to pay them certain sums of money for the objects of their appointment, which he was authorized to borrow on behalf of the State. The 8th section of the Act declared, that for the purpose of raising a fund to pay the principal and interest of the loans aforesaid, the Levy Courts, &c. were authorized annually to levy on the assessable property within their respective counties, clear of the expense of collection severally, the specific sum mentioned in the Act as to each, which said sums shall be collected in the same manner and by the same collectors as the county charges are collected, the Levy Court, &c. taking bond with sufficient security from each collector for the faithful collection and payment of the money in the treasury at the time of paying other public moneys, to and for the use of the State. HELD:
 - 1st. That this tax was not laid for the support of government, but with a political view for the good government and benefit of the community, which is apparent from its provisions, and the general course of legislation on this subject.
 - 2nd. That as the Act required another bond to be given, payable to the treasury, the Legislature never looked to the bond given under the Act of 1794, ch. 53, as furnishing any security for the collection of the tax imposed by the Act of 1831, ch. 281.
 - 3rd. The collector's bond taken under, and in view of the Act of 1794, ch. 53, is not responsible for the tax of 1831, ch. 281. *Ib.*
6. Before a law imposing a tax of a specific sum on each county, for the support of government, can be considered as violating the 18th section of Bill of Rights, it ought to appear clearly, that the persons taxable are not made to contribute according to their actual worth in real and personal property. *Ib.*
7. In the absence of evidence, this Court is bound to presume, that such a tax was laid according to the provisions of the Constitution, and that the Legislature may have divided it among the counties, according to the valuation of property in such local jurisdictions, and had such evidence before them as guided their judgment in that particular. *Ib.*
8. Contracts between collectors of public money and their securities with the Government, must be construed in reference to the terms used in them, and by the laws under which they were made. *Ib.*

TAX AND TAX-COLLECTOR.—*Continued.*

See EVIDENCE, 30, 31.

SURETY, 3-6.

TRUSTS AND TRUSTEES.

See EQUITY, 7.

WILLS, 7.

VERDICT.

Upon a motion in arrest of judgment the Court have no means of judging of the validity of a verdict, but by referring to the pleadings and issues in the cause. *Leopard vs. C. & O. Canal Co.* 169.

See SURETY, 6.

WAIVER.

1. A party may waive the privilege of claiming notice of protest, as he may any other right which the law has secured to him. *Whiteford vs. Burckmyer*, 96.
2. Under an allegation of notice of protest to an endorser in the declaration, the plaintiff may show a waiver of the right by the defendant. *Ib.*

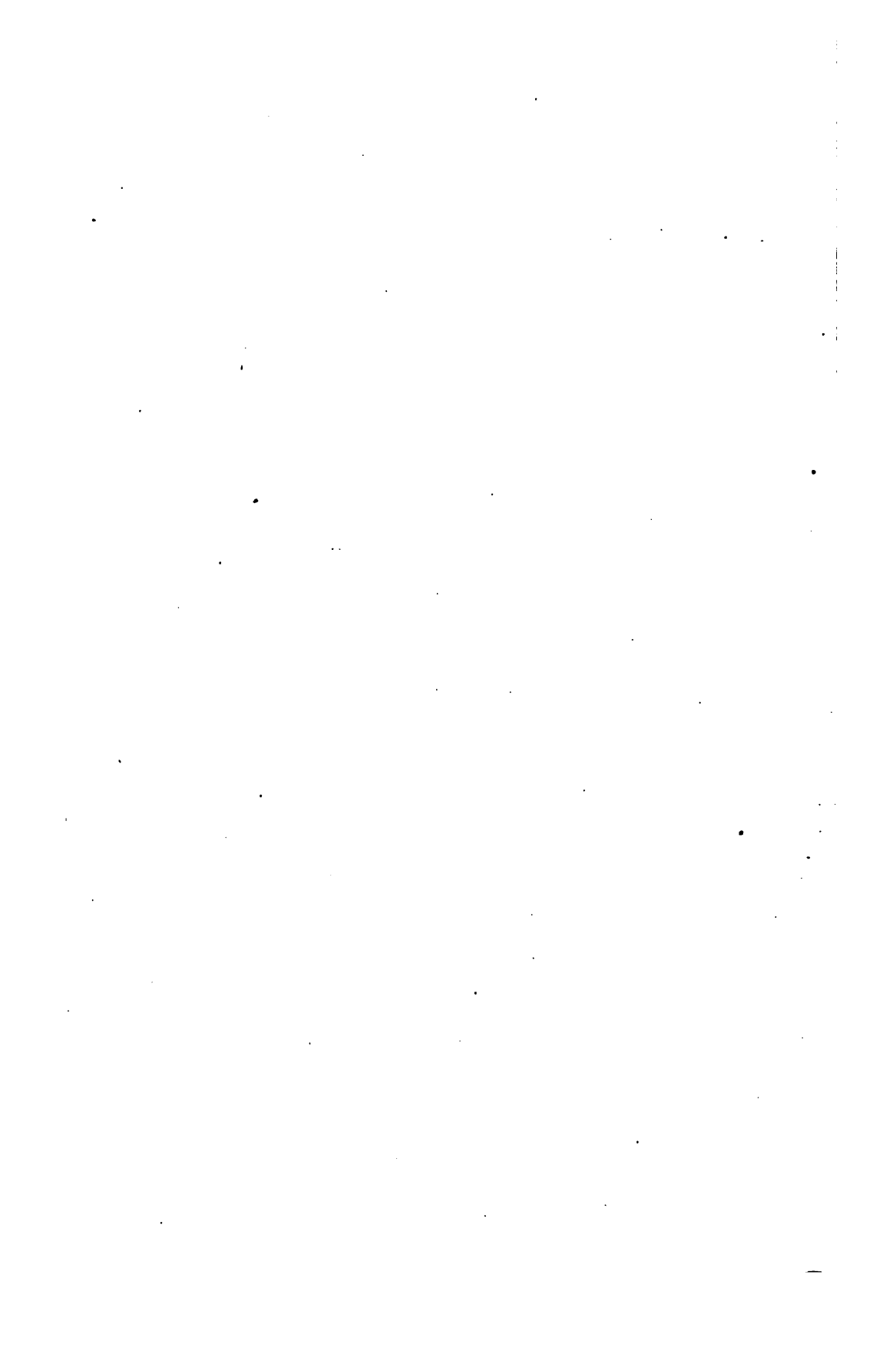
WILLS.

1. In every case where a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law. *Jones vs. Earle*, 301.
2. The will and the codicil constitute one instrument; and the codicil revoking in terms a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil, either in express terms, or by a bequest or devise, so entirely inconsistent with the terms of the will as to make it impossible to give effect to both. *Ib.*
3. Where it was *held*, that the widow of the testator was entitled to a certain fund arising from the sale of negroes, absolutely. *Ib.*
4. It is only where, by gratifying a particular intent as to a part of a will, a more general and more important disposition of other parts of it are defeated, that the particular or minor intent must yield. Where both may be gratified there is no conflict, and consequently no necessity to yield either. *Ib.*
5. A bequest of freedom to slaves, as they arrived at a particular age, is not a legacy to them; nor, when it is granted upon condition of good behavior, will its forfeiture create a lapse, though the bequest of freedom is defeated, the right of the slave after forfeiture, nor to his proceeds after a sale, not being expressly bequeathed to any person. *Ib.*
6. Where there is a bequest of slaves for life, and of freedom after the death of the tenant for life, a clause in the will declaring forfeiture of freedom in case of running away and a sale for life upon their apprehension, is designed for the benefit of the tenant for life, to secure the good conduct of the slaves, and the proceeds of any such slave sold for absconding, in the absence of any provision to the contrary by the testator, will belong to the legatee for life. *Ib.*
7. Where the testator directed the sale of all his real and personal estate, and disposed of the proceeds of sale, and all the residue and

WILLS.—*Continued.*

- remainder of his estate generally, the one moiety to trustees for the benefit of his wife and children in the manner specified in his will, and the other moiety to trustees for the benefit of the complainants. if, from any cause, the legacy to the wife lapsed, it could not sink into the general residue. *Darrington vs. Rogers*, 807.
8. Where a testator divided the residue of his estate into moieties, and devised them to two distinct classes of devisees, one of them his children and heirs-at-law, the other collateral relations, but directed that his widow should have a portion of the moiety given to the children in lieu of dower, and she renounced the will, her portion will be deducted from the moiety given to the collateral relations, as the legacy to her, in consequence of her renunciation, becomes a residuum unaffected by any testamentary disposition, and as such vests in the testator's heirs or next of kin. *Ib.*
 9. The election of a widow to stand upon her legal rights, though it occasions loss to devisees under her husband's will, is still a loss resulting by operation of law, and against which the testator only could have provided an indemnity. *Ib.*
 10. By the election of a widow to renounce her husband's will, all devises and bequests made to her are inoperative and void; and the property given to her, except so far as it may be diminished by the exertion of her legal rights, remains as if no such devises to her had been made. *Ib.*
 11. Apart from the Act of 1810, concerning lapsed legacies and devises, it stands precisely in the condition in which it would have stood had the wife died in the life-time of the testator. *Ib.*
- See APPEAL AND ERROR, 11.
CONTRACT, 1.





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